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Supreme Court of the United States

OCTOBER TERM, 1949

No. 83

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, PETITIONER,

vs.

W. E. CARROLL, CLARENCE H. CALHOUN, MRS. HATTIE J. PICKARD, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

PETITION FOR CERTIORARI FILED MAY 27, 1949.

CERTIORARI GRANTED OCTOBER 17, 1949.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

INDEX

	Original	Print
Record from Superior Court of Fulton County, State of Georgia	1	1
Bill of exceptions	1	1
Order approving bill of exceptions	11	8
Petition	14	9
Exhibit "A"—Contract dated April —, 1943 between the Regents of the University System of Georgia and Southern Broadcasting Stations, Inc.	18	12
Answer of the Fulton National Bank of Atlanta	25	16
Answer of Regents of the University System of Georgia	26	17
Exhibit "A"—Application for license renewal	36	24
Exhibit "B"—Proposed findings of fact and conclusions of law of Federal Communications Commission	44	33
Exhibit "C"—Order of Federal Communications Commission of May 8, 1943	54	46
Exhibt "D"—Application for license renewal	56	48

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	Original	Print
Record from Superior Court of Fulton County, State of Georgia—Continued		
Answer of Regents of the University System of Georgia—Continued		
Exhibits—Continued		
Exhibit "E"—Assignment for hearing	61	53
Exhibit "F"—Application for license without hearing	63	55
Exhibit "G"—Order denying application for license without hearing	71	63
Exhibit "H"—Proposed findings of fact and conclusions of law of Federal Communications Commission	72	64
Exhibit "I"—Resolution of October 11, 1945 of Board of Regents of the University System of Georgia	78	72
Exhibit "J"—Order denying application for license	79	72
Exhibit "K"—Application for standard broadcast station license	81	74
Exhibit "L"—Statement	86	79
Exhibit "M"—Radio broadcasting station license	88	81
Exhibit "N"—Radio broadcasting station license	90	83
Amendment to answer of Regents of the University system of Georgia	92	85
Demurrer and motion to strike answer	94	86
Brief of evidence	98	89
Appearances	98	89
Preliminary statement	98	89
Evidence on behalf of defendant	99	89
Evidence on behalf of plaintiffs	108	96
Defendant's Exhibit 5-A—Sections 1.102, 1.122 and 1.382(b) of the Rules of the Federal Communications Commission	109	97
Plaintiff's Exhibit 2—Letter dated September 22, 1945 from Clarence H. Calhoun to Marion Smith	111	98
Plaintiff's Exhibit 3—Letter dated September 26, 1945 from Sandy Beaver to Clarence H. Calhoun	115	101
Plaintiff's Exhibit 4—Letter dated September 25, 1945 from Clarence H. Calhoun to Marion Smith	115	101
Plaintiff's Exhibit 5—Letter dated September 28, 1945 from Clarence H. Calhoun to Marion Smith	119	103
Plaintiff's Exhibit 6—Letter dated October 2, 1945 from Marion Smith to Clarence H. Calhoun	122	106
Judge's certificate to brief of evidence	124	107
Findings of fact and law	125	108
Judgment	145	122

	Original	Print
Proceedings in Supreme Court of Georgia	149	124
Opinion, Jenkins, C. J.	149	124
Clerk's certificate (omitted in printing)	153	
Order transferring cause to Court of Appeals of Georgia	154	126
Proceedings in Court of Appeals of Georgia	155	127
Opinion, Gardner, J.	155	127
Judgment	172	138
Motion for rehearing	173	139
Order denying motion for rehearing	187	148
Notice of certiorari	188	149
Notice of application for certiorari	189	149
Order denying writ of certiorari	190	150
Clerk's certificate (omitted in printing)	191	
Order allowing certiorari	192	150

[fol. 1]

IN SUPERIOR COURT OF FULTON COUNTY, STATE OF GEORGIA

Bill of Exceptions

Georgia, Fulton County.

Be it remembered: That on the 25th day of September, 1947, and during the September Term, 1947, of the Fulton Superior Court, there came on to be heard before the Honorable Bond Almand, one of the judges of the Superior Court of Fulton County (Atlanta Circuit), then and there presiding, the case of W. E. Carroll, Clarence H. Calhoun, Mrs. Hattie J. Pickard, Mrs. Emma B. Moore, and Sam Pickard, Trustee for Sam Pickard, Jr., as plaintiffs, versus Regents of the University System of Georiga, a corporation under the laws of Georgia, and Fulton National Bank, a corporation, as defendants, the same being case Number A-937 in said Court, said case coming on to be heard on all issues of law and fact before the Court without the intervention of a jury, by agreement of the parties.

Be it further remembered: That said case was an action for an equitable accounting between the parties based upon a contract between the parties executed in April, 1943, and for other equitable relief.

Be it further remembered: That at said time and place said case came on for trial upon an agreed statement of facts, stipulations of the parties, and certain documentary evidence introduced without objection, and after presentation of testimony and oral argument of counsel, the matter was submitted to the Court on all issues of law and fact, without the intervention of a jury, by agreement of all parties.

Be it further remembered: That after hearing all of the evidence and argument of counsel, the said Court took the case under advisement and on the sixth day of October, [fol. 2] 1947, rendered and entered a preliminary order, judgment or decree therein.

To those parts of said order, judgment or decree, to wit:

(1) Ruling that the Federal Communications Commission was without jurisdiction to nullify, change or anywise modify the duties and obligations of the parties to the contract of April 15, 1943; and

(2) Ruling that the order of the Federal Communications Commission of November 9, 1945 denying a license renewal to Regents of the University System of Georgia and its radio station WGST, because of the existence of the contract of April 15, 1943, and authorizing the filing of a further application for license renewal based on a disaffirmance of the contract, did not excuse defendant from further performance of the contract due to impossibility of performance by reason of an act of law; and

(3) Ruling that the Regents of the University System of Georgia could not now assert that the value of the properties received from the plaintiffs was less than the amount paid under the contract of April 15, 1943, prior to its disaffirmance; and

(4) Ruling that the plaintiffs are entitled to recover from Regents of the University System of Georgia a sum equivalent to 15% of the net billings received from the operation of the radio station for the period in question, and to said order, judgment or decree as a whole, defendant, Regents of the University System of Georgia, then and there excepted as being contrary to law, and within the time provided by law, tendered a bill of exceptions pendente [fol. 3] lite thereto which was certified by the Court on October 24, 1947 and filed as a part of the record in said case.

Defendant Regents of the University System of Georgia now excepts to the above specified parts of said order, judgment or decree, and to said order, judgment or decree as a whole, as being contrary to law, and assigns each of said judgments or rulings as error as being contrary to law, and assigns error on said bill of exceptions pendente lite and to each and all of the judgments and rulings therein excepted to, as being contrary to law.

Be it further remembered: That thereafter, on the 10th day of October 1947, the court rendered and entered a final order, judgment or decree in said case in accordance with its preliminary order, judgment or decree of October 6, 1947, that the plaintiffs, W. E. Carroll, Clarence H. Calhoun, Mrs. Hattie J. Pickard, Mrs. Emma B. Moore and Sam Pickard, Trustee for Sam Pickard, Jr., do recover of the defendant, Regents of the University System of Georgia, the sum of $144,968.63 principal, the same being the amount

determined to be due, under the findings of the court, as principal up to and including the month of August 1947; that the said plaintiffs do recover of said defendant the further sum of $10,991.31 as interest on said principal sum to the date of said judgment; that the said plaintiffs do recover of the said defendant future interest on the principal sum of $144,968.63 at the rate of 7 per cent per annum to the time of payment and satisfaction of said judgment, which judgment or decree is hereinafter specified as a part of the record in said case.

[fol. 4] To the said final order, judgment or decree of October 10, 1947 defendant, Regents of the University System of Georgia, then and there excepted as being contrary to law, and now excepts thereto and assigns the same, and each and all of said judgments and rulings, as error as being contrary to law, contrary to the evidence, and against the principles of justice and equity, and says:

(1) That the Court erred in ruling that the Federal Communications Commission was without jurisdiction to nullify, change or in any way modify the duties and obligations of the parties to the contract in question, because:

(a) Under the law, and under the uncontroverted evidence in this case, the parties to said contract knew that the operation of Radio Station WGST depended upon the grant of a license to so operate from the said Federal Communications Commission, and said operation was subject to federal regulation and control under the Communications Act of 1934, as administered by the Federal Communications Commission, and the contract of April 15, 1943, was made with reference to that law.

(b) The parties also knew that under said Communications Act of 1934, the Federal Communications Commission had jurisdiction over any contract or agreement affecting the operation of a radio station in the public interest, or affecting the present or future financial ability of a radio station to operate in the public interest, and the contract of April 15, 1943, was made with reference to that law.

(c) The Federal Communications Commission found the contract of April 15, 1943, to be such a contract over which [fol. 5] it had jurisdiction, and the Federal Communications Commission did have jurisdiction over the subject matter and over said contract.

(d) The decision of the Federal Communications Commission that the contract was one over which it had jurisdiction because it affected the ability of the radio station to function in the public interest, cannot be collaterally attacked in the Fulton Superior Court, and the Fulton Superior Court cannot substitute its judgment as to the effect of the contract upon the ability of the station to function in the public interest for the judgment of the Federal Communications Commission on that subject, and to so hold is to substitute the Fulton Superior Court for the agency designated by Congress as the forum for such matters in a field in which federal power is exclusive.

(2) That the Court erred in ruling that the action of the Federal Communications Commission, in denying a license renewal to Regents of the University System of Georgia so long as the contract of April 1943 remained in effect, did not excuse defendant from further performance of the contract due to impossibility of performance by reason of an act of law, because under the law and the uncontroverted evidence in said case, further performance of the contract of April 15, 1943, was rendered impossible by the action of the Federal Communications Commission, which action is equivalent to an act of law, and under the ruling of the Federal Communications Commission a license to operate the radio station would not be granted so long as any force and effect were given to said contract by Regents of the University System of Georgia.

[fol. 6] (3) That the Court erred in ruling that the Regents of the University System of Georgia could not now assert that the value of the properties received from the plaintiffs was less than the amount actually paid under the contract prior to it disaffirmance, because, under the law, specific performance of the contract of April 15, 1943, cannot be had, and no action lies as for breach of contract, but in equity the parties are not without a remedy, they having the right to an adjustment of equities under the doctrine of equitable rescission, and it was proper to assert and prove by uncontradicted evidence that the physical properties, equipment, and other assets received by the defendant, Regents of the University System of Georgia, from the plaintiffs, was less in value than the amount of money already paid to the plaintiffs under the contract.

(4) That the court erred in ruling that the plaintiffs are entitled to recover from Regents of the University System of Georgia a sum equivalent to 15% of the net billings received from the operation of Radio Station WGST for the period in question, because:

(a) Under the law and the uncontroverted evidence in said case, said ruling amounts to an order for specific performance of a contract for the payment of money.

(b) Under the law and the uncontroverted evidence in said case, said order and ruling amounts to an order for specific performance of a contract, the performance of which will result in a violation of law, and a violation of a valid order and ruling of the Federal Communications Commission, the agency designated by the Congress of the United States to administer and carry out the provisions of the [fol. 7] Communications Act of 1934, the operation of said radio station being subject to said law and subject to the exclusive jurisdiction of said federal agency.

(c) Under the law and under the undisputed evidence, said ruling and said judgment is based upon an erroneous measure of damages for the reason that Radio Station WGST could not legally function without a license from the Federal Communications Commission, and the Federal Communications Commission by its order of November 9, 1945 denied the application of the defendant for a renewal of the license because of the existence of the contract of April 15, 1943. Operation of the Station thereafter, with the contract in force, would have been illegal. Without the operation of the station, the contract had no monetary value, being predicated solely upon 15% of net billings from the operation of the station. Under the law there can be no greater recovery for a breach of contract than there would have been had there been no breach. Had there been no breach of contract, the radio station could not legally have operated from November 9, 1945, to the date of said trial.

Regents of the University System of Georgia names itself as plaintiff in error herein.

It also names as plaintiff in error herein its co-defendant in said case, to wit: The Fulton National Bank of Atlanta (Fulton National Bank, a corporation).

It names as defendants in error herein W. E. Carroll, Clarence H. Calhoun, Mrs. Hattie J. Pickard, Mrs. Emma B. Moore, and Sam Pickard, Trustee for Sam Pickard, Jr., the plaintiffs in said case.

[fol. 8] Plaintiff in error, Regents of the University System of Georgia, specifies as material to a clear understanding of the errors complained of in this Bill of Exceptions, the following portions of the record in said case:

1. The petition filed by W. E. Carroll, Clarence H. Calhoun, Mrs. Hattie J. Pickard, Mrs Emma B. Moore and Sam Pickard, Trustee for Sam Pickard, Jr. (omitting process and service).

2. The answer filed by defendant, The Fulton National Bank of Atlanta.

3. The answer filed by defendant, Regents of the University System of Georgia;

4. The amendment to the answer filed by Regents of the University System of Georgia, together with the order allowing same.

5. The motion of plaintiffs to strike the answer of defendant Regents of the University System of Georgia.

6. The brief of evidence in said case heretofore approved by the Court and filed as a part of the record in said case.

7. The preliminary order, judgment or decree entered by the Court under date of October 6, 1947.

8. The Bill of Exceptions Pendente Lite filed by the Regents of the University System of Georgia and allowed by the Court on October 24, 1947, and filed as a part of the record in said case.

9. The order, judgment or decree of the Court entered under date of October 10, 1947.

[fol. 9] 10. The entries of filing of each and all of the parts of the record above specified to be entered and transmitted in the proper order.

Plaintiff in error shows that the Supreme Court of Georgia, and not the Court of Appeals, has jurisdiction of this Bill of Exceptions under Article VI, Section II, Para-

graph IV of the Constitution of the State of Georgia of 1945 for the reason that the proceeding in which the judgment or decree excepted to was rendered was one in equity involving an equitable accounting, and the granting of other equitable relief.

Plaintiff in error, Regents of the University System of Georgia, comes now, within the time allowed by law, and assigning error on each and all of the rulings complained of as being contrary to law, tenders this Bill of Exceptions, and prays that the same be certified as provided by law and be transmitted to the Supreme Court of Georgia, in order that the error complained of may be considered and corrected, all as provided by law.

This 29 day of October, 1947.

Eugene Cook, Attorney General of Ga., Hamilton Lokey, Deputy Assistant Attorney General of Georgia, Margaret Hartson, Attorney, Attorneys for Regents of the University System of Georgia, Plaintiff in Error. P. O. Address: 201 State Capitol, Atlanta 3, Georgia.

[fol. 10] NOTICE

To: Honorable James A. Branch, Thomas B. Branch, Jr., Attorneys for W. E. Carroll, et al., Hurt Building, Atlanta, Georgia.

Please take notice that the above and foregoing Bill of Exceptions will be presented to Honorable Bond Almand, Judge of the Fulton Superior Court, for approval at the Fulton County Court House, Atlanta, Georgia at 3:00 p. m. Wednesday afternoon, October 29, 1947. You are invited to be present at that time.

This October 29, 1947.

Hamilton Lokey, Attorney for Regents of the University System of Georgia.

We the undersigned attorneys for W. E. Carroll, et al., plaintiffs in the above entitled matter, hereby acknowledge service of the above and foregoing notice, and acknowledge service of a copy of the proposed Bill of Exceptions in this case, and hereby waive the opportunity to be heard as to

whether the Bill of Exceptions as tendered is correct and complete.

This 29 day of October, 1947.

James A. Branch (by HL), Thomas B. Branch, Jr. (by HL), Attorneys for W. E. Carroll et al.

[fol. 11] ORDER APPROVING BILL OF EXCEPTIONS—October 29, 1947

GEORGIA, FULTON COUNTY.

I do certify that the foregoing bill of exceptions is true, and specifies all the evidence and specifies all of the record material to a clear understanding of the errors complained of; and the Clerk of the Superior Court of Fulton County is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the Supreme Court, that the errors complained of may be considered and corrected.

This 29th day of October, 1947.

Bond Almand, Judge, Fulton Superior Court, (Atlanta Circuit).

ACKNOWLEDGMENT OF SERVICE

Due and legal service of the above and foregoing bill of exceptions is hereby acknowledged, copy received, all other and further service and notice of service waived; notice under Code Section 6-902A received. This acknowledgment of service is signed after the certification of the Bill of Exceptions by the trial judge.

This 29 day of October, 1947.

Smith, Kilpatrick, Cody, Rogers & McClatchey, Attorneys for the Fulton National Bank of Atlanta, Plaintiff in Error.

James A. Branch and Thomas B. Branch, Jr., Attorneys for W. E. Carroll, Clarence H. Calhoun, Mrs. Hattie J. Pickard, Mrs. Emma B. Moore and Sam Pickard, Trustee for Sam Pickard, Jr., Defendants in Error.

[fols. 12-13] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 14] In Superior Court of Fulton County

Petition—Filed June 18, 1947

Georgia, Fulton County:

The petition of W. E. Carroll, Clarence H. Calhoun, Mrs. Hattie J. Pickard, Mrs. Emma B. Moore and Sam Pickard, Trustee for Sam Pickard, Jr., shows as follows:

1. The defendants herein are the Regents of the University System of Georgia, a corporation under the laws of Georgia, and Fulton National Bank, a corporation. Each of said defendants has its principal office in said county and is subject to suit therein.

2. On the — day of April, 1943, the defendant, the Regents of the University System of Georgia, entered into a contract with the petitioners, a copy of which contract is hereto attached, marked Exhibit "A" and made a part thereof.

3. As will be seen by reference to said contract, petitioners sold said defendant, the Regents of the University System of Georgia, the shares of stock in Southern Broadcasting Stations, Inc., held and owned by said petitioners, amounting in the aggregate to 9,824 shares, for a consideration to be paid as specified in said contract.

4. As will be seen by reference to said contract, the said defendant, the Regents of the University System of Georgia, agreed and obligated itself to pay petitioners as the full purchase price of said shares of stock, a sum equal to 15 per cent of the net billings of Radio Station W.G.S.T., located in Fulton County, Georgia, of the sale of time on the air for any and all types of broadcasting visual and sound, including any and all revenues which may be derived from such sources as a result of any new develop-
[fol. 15] ments in the broadcasting field during the period in which the payments under said contract are to be made by said defendant.

The said contract further provides that the purchase should be deemed to have been consummated as of the 15th

day of April, 1943, and, for the purpose of calculating payments to be made petitioners, was to be effective from that date. The contract further provides that within ten days after the expiration of each month from and after the aforesaid effective date, said defendant, the Regents of the University System of Georgia, shall determine the net billings for said month and shall pay 15 per cent thereof to the "hereinafter named agent of the second parties and said monthly payments of 15 per cent of the net billings of said station shall exist and continue for a full period of 80¾ months and until January 6, 1950." The agent referred to to whom payments should be made is Fulton National Bank, Candler Building Branch, Atlanta, Georgia.

5. Fulton National Bank is named as defendant herein as it is a proper party to this action by reason of the fact that said contract provides that such payments should be made to it as agent as stated above.

6. Said defendant, the Regents of the University System of Georgia, paid the amounts which became due to petitioners under said contract up to and including the month of July 1945, but has neglected and failed to pay any of the amounts which became due and payable under said contract since that time.

7. Petitioners allege that for each month since July 1945 amounts have become due and payable to petitioners under [fol. 16] the terms of said contract and that a large amount is now due to petitioners under the terms of said contract, but petitioners are unable, for want of sufficient information, to set forth specifically and in detail the amount so due. It will require an accounting to determine the amounts due the petitioners as aforesaid.

8. Under the terms of said contract, the amount which accrued and became payable each month as representing 15 per cent of the net billings of radio station W.G.S.T. was due and payable within ten days after the expiration of each such month and would therefore bear interest from due dates thereof.

9. Payments due as aforesaid have not been made either to petitioners or to their said agent, Fulton National Bank.

10. Radio Station W.G.S.T. is held and owned by the defendant, the Regents of the University System of Georgia,

in trust for Georgia School of Technology and as will be seen by reference to said contract, said contract was made by said defendant for and on behalf of Georgia School of Technology.

11. All of the records showing the amounts of net billings of said Radio Station W.G.S.T. and the amounts for the sale of time on the air for any and all types of broadcasting are in possession, custody or control of the defendant, the Regents of the University System of Georgia, and it will be necessary that such records be audited and examined in order to ascertain the amount due petitioners. The amounts due on the said contract under the terms thereof would be payable to Fulton National Bank as the agent of petitioners and in turn would be payable by said [fol. 17] Fulton National Bank to petitioners according to the strict terms of the contract, but petitioners allege that in equity they are entitled to have an accounting to determine the amounts due and the interest thereon and to have a decree providing for the recovery of said amounts direct by petitioners.

12. Petitioners allege that the remedy at law is not as full, adequate and complete as is the remedy in equity.

Wherefore, petitioners pray as follows:

(1) That process issue requiring defendants to appear and answer this complaint;

(2) That there be an accounting to ascertain and determine the amounts due petitioners under the contract as set out in the foregoing petition and that by the judgment and decree of this Court the petitioners be awarded judgment for such amounts and interest thereon;

(3) That petitioners have such other and further relief as may be just and proper in the premises.

James A. Branch, Thos. B. Branch, Jr., Petitioners' Attorneys.

[fol. 18] EXHIBIT A TO PETITION

GEORGIA

Fulton County

This Agreement, entered into this — day of April, 1943, by and between The Regents of the University System of Georgia, the first party, and all of the Stockholders of Southern Broadcasting Station, Inc., the second parties, the names of whom and the number of shares of such stock owned by each of them being as follows:

Name	No. of Shares
Sam Pickard, Trustee	5,000
Clarence H. Calhoun	1,472
W. E. Carroll	1,176
Mrs. Hattie J. Pickard	1,176
Mrs. Emma B. Moore	1,000

Witnesseth

1. This contract is made by the first party for and on behalf of Georgia School of Technology.

2. The second parties and all of them desire to sell to the first party all the shares of stock owned by them respectively, in Southern Broadcasting Stations, Inc., and the first party desires to acquire said stock for the benefit of the Georgia School of Technology.

3. In consideration of the mutual promises and stipulations herein contained, the second parties hereby agree to and do sell and transfer to the first party all of the shares of stock owned by them in Southern Broadcasting Stations [fol. 19] Inc., aggregating 9,824 shares of common stock therein, and the first party hereby buys said capital stock from said second parties at and for the consideration hereafter stated.

4. The first party agrees to pay to the second parties and the second parties agree to accept from the first party, as the full purchase price of said shares of stock, a sum equal to fifteen (15%) per cent of the net billings of Radio Station WGST, located in Fulton County, Georgia, from the sale of time on the air for any and all types of broadcasting, visual or sound, including any and all revenues which may

be derived from such sources as a result of any new developments in the broadcasting field during the period in which the payments hereunder are to be made by the first party to the second parties hereto. The term "net billings" shall be construed as these words are known and understood in the radio industry and shall include only the net proceeds actually collected by Station WGST as a result of the operations of said Station. This purchase shall be deemed to have been consummated as of the 15th day of April, 1943, and for the purpose of calculating the payments to be made to the second parties, shall be effective from said date. Within ten (10) days after the expiration of each month from and after the aforesaid effective date of this contract, the first party shall determine the net billings for said month and shall pay fifteen (15%) per cent thereof to the hereinafter named agent of the second parties and said monthly payments of fifteen (15) per cent of the net billings of said Station shall exist and continue for a full period of eighty [fol. 20] and three-fourths (80¾) months and until January 6th, 1950; the amount to be paid for any fractional month during this time to be in proportion to the days involved. The books of the first party shall be open to inspection by the second parties, or their agent, at all reasonable times to the end that they may check the correctness of the net billings as ascertained by the first party for any period.

5. The second parties have, for their convenience, selected Fulton National Bank, Candler Building Branch, Atlanta, Georgia, as their agent to receive all payments for their account from the first party under this contract and the first party is hereby authorized and requested to deliver to said Agent all of said payments herein provided for and the receipt of said Agent for such payments shall be a complete discharge of all liability of the first party to the second parties for any payments so delivered to said Agent. This provision for the selection of an Agent by the second parties, together with the right of the first party to make payments hereunder to said Agent, is coupled with an interest and shall be irrevocable; and should any successor, executor or administrator or assign of any one of the second parties succeed to any of the rights of any one of said second parties in and to any of the sums to be paid hereunder, the first party shall nevertheless, have the right

to continue to make all payments provided for by this agreement to the said Agent which the second parties shall have selected, as herein provided, and no such successor, executor, administrator or assign of any one of the second parties hereunder shall have a right to demand the payment [fol. 21] of any of said sums other than by and through said Agent and in the manner herein provided for.

6. The first party agrees that it will in good faith undertake to have the Georgia School of Technology operate Station WGST in an efficient and satisfactory manner to the end that said Broadcasting Station may continue to earn and receive as large net billings as may be possible, having in view general business conditions and other factors which enter into and effect the results of such operations.

7. The second parties jointly and severally make the following warranties as an inducement to the first party to purchase the above-described capital stock, to-wit:

(a) That Southern Broadcasting Stations, Inc. does not have outstanding any other capital stock than the shares hereinbefore described and herein sold to the first party.

(b) That the second parties, respectively, own the fee simple title to the shares of stock hereinbefore set opposite their names; that there are no liens or encumbrances on said shares of stock, and that they, respectively, have a legal right to transfer the unencumbered title thereto to the first party.

(c) That there is attached hereto, marked "Exhibit A", an inventory of the assets of Southern Broadcasting Stations, Inc., which is a correct inventory.

(d) That there is attached hereto, marked "Exhibit B", a list of all of the contracts which Southern Broadcasting Stations, Inc., has now outstanding with any and all persons, whether with employees for services or with suppliers of goods, wares and merchandise, or with the labor unions or broadcasting systems or stations, or for any other purpose [fol. 22] whatsoever, including contracts of lease or rent, together with a statement of the liabilities involved thereunder; and that there do not exist any undisclosed contracts which impose any liability on Southern Broadcasting Stations, Inc.

(e) There is attached, marked "Exhibit C", a correct statement of all of the liquidated and known liabilities of Southern Broadcasting Stations, Inc. and also all of the known unliquidated claims against said Station and that there are no known demands or claims against said Station which are not disclosed in said Exhibit.

(f) That the said parties will indemnify the first party against any and all claims or demands of every character against Southern Broadcasting Stations, Inc., which are not herein disclosed and will indemnify and hold harmless the first party against all damages, loss and costs which the first party may, directly or indirectly, sustain, suffer or endure by reason of any such undisclosed claim or demand whether known or unknown; and should the first party suffer any such loss, damage or cost, it is hereby authorized to withhold a sufficient amount of the purchase price of said capital stock to reimburse itself in full therefor.

(g) Ad Valorem taxes of all kinds against Southern Broadcasting Stations, Incorporated, or its properties for the year 1943 shall be pro-rated to April 15, 1943, and the party of the first part may deduct from payments to be made to parties of the second part or their agent the proportionate share of the taxes up to the date of proration. Income taxes both state and federal, on 1943's income will [fol. 23] be similarly pro-rated, and the proportion up to the time of proration may similarly be deducted by the party of the first part from payments hereunder. The party of the second part warrants that other than the 1943 ad valorem taxes and income taxes on 1943's income as herein set out there are no tax liabilities of any kind, either ad valorem, license or income taxes, either known or unknown against the Southern Broadcasting Stations, Inc., or its properties. Should there hereafter develop any such liabilities of any kind, the party of the second part agrees to indemnify the party of the first part against same, and ~~any~~ amounts of such taxes together with interest and penalties, if any, which may be hereafter established, may be deducted by the party of the first part from the payments of the purchase price under this contract as herein provided.

(h) The second parties will cooperate with the first party and with the Georgia School of Technology as opportunities

may present themselves in an effort to maintain the present commercial relations between WGST and any and all broadcasting systems and stations with which it has been doing business and the second parties will not during the life of this contract, hire any of the employees now actually engaged in the operation of Station WGST or in soliciting or handling the sale of time on said Station, without the consent of the President of Georgia School of Technology.

8. The second parties will file with the first party a copy of the agreement made between them and their aforesaid Agent which is to collect and receive from the first party the purchase price of said capital stock.

[fol. 24] In witness whereof, the first party has hereunto fixed its seal and has had this instrument signed by its Chairman, by and under the authority of a resolution of The Board of Regents of the University System of Georgia, and the second parties have hereunto affixed their signatures and seals, the day and year first above written.

The Regents of the University System of Georgia, by (S.) Marion Smith, Chairman, W. E. Carroll (LS), Hattie J. Pickard (LS), Clarence H. Calhoun (LS), Mrs. Emma B. Moore (LS), Sam Pickard, Trustee (LS), for Trust of Sam Pickard, Jr. (Seal.)

[File endorsement omitted.]

[fol. 25] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

ANSWER OF THE FULTON NATIONAL BANK OF ATLANTA—Filed July 2, 1947

Now comes The Fulton National Bank of Atlanta, named as a defendant in the above case, and answers the petition as follows:

1. The allegations of the following paragraphs are admitted: Paragraphs 1 and 5.

2. Answering Paragraphs 2, 3 and 4, the allegations of the petition refer to the provisions of a contract attached to the petition, which speaks for itself as to its terms.

3. Defendant can neither admit nor deny, for want of sufficient information, the allegations of the following paragraphs: Paragraphs 6, 7, 8, 9, 10, 11 and 12.

Further answering the petition defendant shows as follows:

4. As is alleged in the petition, this defendant was named as agent to receive payments to be made by the Regents of the University System of Georgia under the contract attached to the petition. This defendant did act as such agent and received payments from the Regents of the University System of Georgia for the period from April 15, 1943, through the period January 1945, the total amount so received being $91,227.39. Defendant disbursed such funds in accordance with the contract attached to the petition, except for the sum of $53.05, which could not be disbursed equally to the parties entitled thereto, which is now still held by this defendant. Defendant offers to pay into court [fol. 26] or otherwise, as the court may direct, the said sum of $53.05, this defendant claiming no interest therein.

Wherefore, defendant prays that it be dismissed hence without costs.

Smith, Kilpatrick, Cody, Rogers & McClatchey,
Devereaux F. McClatchey, Attorneys for The Fulton National Bank of Atlanta.

[File endorsement omitted.]

IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

ANSWER OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA—Filed August 15, 1947

Now comes Regents of the Universty System of Georgia, named as a defendant in the above case, and answers the petition as follows:

1. Defendant admits the allegations of Paragraphs 1, 2, 3, 4, 5 and 10 of plaintiff's petition.

2. Answering Paragraph 6, defendant admits that it paid to petitioners' agent, the Fulton National Bank, sums equivalent to 15% of its net billings, as per contract up through the month of July 1945, and has made payments to [fol. 27] petitioners the total sum of $149,408.38. Defendant further admits that it has made no further payments to petitioners or their agent under said contract for the reasons set out more fully hereinafter.

3. Answering Paragraph 7, defendant shows that since making the payment under said contract for the month of July 1945, it has made no further computations to determine what 15% of its net billings to date amount to. Further answering said paragraph, defendant shows that it has in its possession the basic data from which said computations can be made and prior to the time of trial defendant by amendment ~~will~~ set out said computations. Defendant denies, however, that any such sums are due to petitioners for the reasons set out hereinafter.

4. Answering Paragraph 8, defendant shows that the terms of the contract referred to speak for themselves. The right to collect interest on past due payments is a legal conclusion requiring no answer. Defendant shows, however, that it is not indebted to petitioners in any amount for the reasons set out more fully hereinafter.

5. Answering Paragraph 9, defendant admits it has made no payments to petitioners or their agents other than those admitted in Paragraph 2 of this answer. Further answering, defendant denies that any further payments are due to petitioners for the reasons more fully set out hereinafter.

6. Answering Paragraph 11, defendant admits that it has possession, custody and control of the records of Radio Station WGST. The remaining allegations of said para- [fol. 28] graph are conclusions of law requiring no answer from this defendant, except that this defendant denies that it is indebted in any amount to petitioners for the reasons more fully set out hereinafter.

7. The allegations of Paragraph 12 constitute a legal conclusion requiring no answer.

8. Further answering said petition, defendant shows that it is not indebted to petitioners in any amount by reason of the following facts:

9. That on January 31, 1940, defendant filed an application for renewal of its broadcasting license with the Federal Communications Commission, (hereinafter referred to as the FCC), the governmental authority to which the Congress of the United States had delegated control and regulation of licenses for radio broadcasting stations. A copy of the application for license renewal is attached hereto as Exhibit "A", and incorporated herein by reference. Without such a license from the FCC, Radio Station WGST could not have lawful operated. At said time Radio Station WGST was being operated for defendant by a corporation known as Southern Broadcastintg Stations, Inc. under a contract which by its terms had until January 6, 1950 to run. The capital stock of said corporation was owned by the petitioners herein.

10. That the FCC challenged the propriety and legality of the further operation of Radio Station WGST by defendant through Southern Broadcasting Stations, Inc. as being not in the public interest, and as being in contravention of the Federal Communications Act. That after hearing, the FCC issued proposed findings of fact and conclusions of the Commission on March 23, 1943. A copy of said proposed findings of fact and conclusions of the Commission [fol. 29] is hereto attached as Exhibit "B" and incorporated herein by reference. During said proceedings before the FCC defendant was permitted to continue operations of Station WGST under temporary licenses.

11. That thereafter on May 8, 1943 the FCC issued its order adopting the proposed findings of fact and conclusions of the Commission of March 23, 1943 as the findings of fact and conclusions of the Commission relative to defendant's application for license renewal. By said order the application of defendant for a renewal of its license was denied, without prejudice to the filing of a further application for renewal of license in accordance with the conclusions reached by the FCC, such further application to be filed within 60 days and to set forth the plan of defendant for the acquisition of the necessary facilities and equipment owned by Southern Broadcasting Stations, Inc., and the acquisition of the business management, representation and control of the future operations of Station WGST, which were then vested in Southern Broadcasting Stations,

Inc. until January 6, 1950, by virtue of the contract referred to in Paragraph 9 of this answer. A copy of said order is hereto attached as Exhibit "C" and incorporated herein by reference.

12. That thereafter, on May, 22, 1943 defendant filed a further application for renewal of its license, a copy of said application being attached hereto as Exhibit "D" and incorporated herein by reference. As an exhibit to said application defendant attached a copy of the contract of April 15, 1943, upon which this present suit is based as its plan for acquiring the necessary facilities and equip- [fol. 30] ment of Southern Broadcasting Stations, Inc., including the business management, representation and control of the future operations of the radio station. By said contract defendant acquired all the capital stock of Southern Broadcasting Stations, Inc., procured the transfer of all the assets of said corporation to defendant and thereafter, in July of 1943 dissolved said corporation by surrendering its charter in Fulton Superior Court.

13. That thereafter, on October 12, 1943 the FCC assigned for hearing the matter of defendant's application for license dated May 22, 1943. A copy of the notice of assignment is hereto attached as Exhibit "E", and incorporated herein by reference.

14. That in response to said notice of assignment defendant petitioned the FCC to grant its license without hearing. A copy of said petition is hereto attached as Exhibit "F" and incorporated herein by reference.

15. That on November 23, 1943 the petition of defendant (Exhibit "F") was denied by the FCC. A copy of the order of denial is hereto attached as Exhibit "G" and incorporated herein by reference.

16. That thereafter said matter was heard by the FCC and testimony was given by witnesses for defendant, including Hon. Ellis Arnall, Governor of Georgia, Mr. Marion Smith, Chairman of the Board of Regents, Sandy Beaver and Frank M. Spratlin, members of the Board of Regents, T. Grady Head, Attorney General of Georgia, and John Fulton, manager of Radio Station WGST. After consideration of [fol. 31] said application and the testimony presented by defendant, the FCC issued proposed findings of fact and

conclusions of the Commission on September 19, 1945. A copy of said proposed findings of fact and conclusions of the Commission is attached hereto as Exhibit "H" and incorporated herein by reference.

17. That upon receipt of notice of the action of the FCC of September 19, 1945, defendants made no further payments to petitioners under said contract of April 15, 1943, and on October 11, 1943 the Board of Regents, the governing body of defendant, passed a formal resolution directing that defendant make no further payments under said contract. A copy of the resolution of October 11, 1945 is attached hereto as Exhibit "I" and incorporated herein by reference.

18. That thereafter, on November 9, 1945 the FCC issued its order adopting the proposed findings of fact and conclusions of the Commission of September 19, 1945 as the findings of fact and conclusions of the Commission relative to defendant's second application for license renewal. By said order the second application of defendant for a renewal of its license was denied, without prejudice to the filing of further application for renewal, by December 18, 1945, provided defendant affirmatively showed that it was giving no further effect to the contract of April 15, 1943, (the contract upon which this suit is based.) A copy of said order is hereto attached as Exhibit "J" and incorporated herein by reference.

19. That thereafter on December 4, 1945 defendant filed its third application for renewal of its license. A copy of said application is hereto attached as Exhibit "K" and [fol. 32] incorporated herein by reference. At the same time defendant filed an application for a construction permit. As an exhibit to both applications defendant attached a statement affirmatively showing its actions in regard to the contract of April 15, 1943. A copy of said statement is attached hereto as Exhibit "L" and incorporated herein by reference.

20. That thereafter, on March 7, 1946 the FCC issued to defendant the license applied for on December 4, 1945, said license covering the period from March 7, 1946 to May 1, 1947. A copy of said license is attached hereto as Exhibit "M" and incorporated herein by reference.

4. Is applicant a citizen of the United States? Yes

If so, state whether by birth or naturalization Created by act of Ga. Legislature

5. Is the applicant a representative of an alien or foreign government? No

1. Name of applicant Georgia School of Technology

2. Post-office address: State Georgia City Atlanta

Street and number North Avenue at Cherry Street

3. What is applicant's principal business? Technological School

(a) What other business or businesses is applicant directly or indirectly interested in; explain fully? None

(b) If applicant is a corporation, give the names and addresses of the officers, directors, and principal stockholders and state specifically what other business or businesses each of these parties is directly or indirectly interested in; explain fully? (Attach additional sheets if necessary.)

State owned school

4. Is applicant a citizen of the United States? Yes

If so, state whether by birth or naturalization Created by act of Ga. Legislature

5. Is the applicant a representative of an alien or foreign government? No

6. State whether applicant is a corporation, partnership, or association State owned institution

7. If applicant is a corporation—

(a) Under laws of what State or country is it organized? Created by Ga. Legislature

(A copy of the articles of incorporation duly certified by the Secretary of State shall be attached if not heretofore filed with the Commission)

(b) Is more than one-fifth of capital stock owned of record or may it be voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country? No

* Name must be identical with that used in existing law.

(1)

EXHIBIT "A" TO ANSWER

UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

APPLICATION FOR RENEWAL OF REGULAR BROADCAST STATION LICENSE

(Submit in duplicate to Federal Communications Commission, Washington, D. C. Swear to one copy)

To the Federal Communications Commission:

1. Name of applicant Georgia School of Technology

2. Post-office address: State Georgia City Atlanta

Street and number North Avenue at Cherry Street

3. What is applicant's principal business? Technological School

(*a*) What other business or businesses is applicant directly or indirectly interested in; explain fully? None

(*b*) If applicant is a corporation, give the names and addresses of the officers, directors, and principal stockholders and state specifically what other business or businesses each of these parties is directly or indirectly interested in; explain fully? (Attach additional sheets if necessary.)

State owned school

(c) Is any director or officer an alien? No . If so, state name, citizenship, and position of each

(d) Give names and addresses and citizenship of all stockholders owning and/or voting 10 per-cent or more of applicant's stock and percentage of stock held by each

None

8. If applicant is a corporation, is applicant directly or indirectly controlled by any other corporation?

Not a corporation

(a) If so, give name and address of such controlling corporation

(b) Under laws of what State or country is such corporation organized? (A copy of the articles of incorporation properly certified by the Secretary of State shall be attached if not heretofore filed with the Commission)

(c) Is more than one-fourth of capital stock of such corporation owned of record or may it voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country?

(d) Is any director or officer of such corporation an alien? Is so, state name, citizenship, and position of each

(e) Is the above-described controlling corporation in turn a subsidiary?
If so, attach additional sheets answering questions 8 (a) to (d), inclusive, for each company to and including the organization having final control.

9. (a) If application is made in behalf of a copartnership, there must be filed a certified copy of the articles of copartnership (unless heretofore filed).

(b) If application is made in behalf of an unincorporated association, there must be filed a certified copy of the articles of association and bylaws (unless heretofore filed), showing the purpose of the association.

Applicant must also show—

(1) The names, addresses, and citizenship of the officers and the offices held by each

M. L. Brittain, President of Georgia School of Technology, whose address is 204 North Avenue, Atlanta,

(2) The number of members No members

(3) Whether any members are aliens None

(4) Name, citizenship, and position of each alien None

10. (a) Is applicant directly or indirectly, through stock ownership, contract, or otherwise, interested in the ownership or control of any other radio broadcasting stations? No

(b) If so, state call letters and location of such stations None

(c) Has the applicant in the past been directly or indirectly interested in the ownership or control of any radio broadcasting stations? No

(d) If so, state call letters and location of such stations None

1. (a) State applicant's relation to station (whether applicant is owner or lessee, and, if neither owner nor lessee, state nature of applicant's interest in use and control of station) (If not owner, a

copy of agreement showing applicant's interest in station must be attached if not heretofore filed with the Commission)

(b) If applicant is not owner of station, who is? Applicant

(c) Does applicant have absolute control of station, both as to physical operation and programs broadcast? Applicant has supervision of programs and operation. Employment contract on file with F.C.C.

(If not, attach copy of any contract which may in any way affect applicant's right to do so)

2. Attach detailed financial statement showing applicant's assets and liabilities and state fully the facts showing applicant's financial responsibility with respect to the operation of station.

3. (a) Has the applicant been finally adjudged guilty by any Federal court of unlawfully monopolizing, or attempting unlawfully to monopolize, radio communication, directly or indirectly, through control of manufacture or sale of radio apparatus, exclusive traffic arrangements, or any other means, or of unfair methods of competition? No

21. That from the time in 1940 when defendant's previous license expired, until March 7, 1946 when defendant's subsequent license was issued, defendant operated Station WGST under temporary licenses granted by the FCC.

22. That thereafter, on April 17, 1947, a further renewal of defendant's license was granted by the FCC, said license covering the period from May 1, 1947 to May 1, 1950. Defendant is now operating said radio station under and by authority of said license. A copy of said license is hereto attached as Exhibit "N" and incorporated herein by reference.

23. That performance of the contract of April 15, 1943 became impossible after September 19, 1945 by reason of the actions of the FCC as set out heretofore, and that said impossibility resulted from an act of law. Further performance of said contract is therefore excused.

[fol. 33] 24. That Southern Broadcasting Stations, Inc., which was owned by petitioners prior to April 15, 1943, was a party (as intervenor) to the proceedings before the FCC which resulted in the proposed findings of fact and conclusions of the Commission of March 23, 1943, and the final order of the FCC of May 18, 1943 (Exhibits "B" and "C"). These proceedings were designated by the FCC as "Docket No. 5903."

25. That petitioners had actual knowledge of the filing of the second application for renewal of license, referred to in Paragraph 12 of defendant's answer, and designated by the FCC as "Docket No. 6534." That petitioners also had actual knowledge of the notice of hearing dated October 12, 1943, referred to in Paragraph 13 of defendant's answer. That petitioners had actual knowledge of the hearing before the FCC and of the proposed decision of the FCC of September 19, 1945, both referred to in Paragraph 16 of defendant's answer. That petitioners also had actual knowledge of the final order of the FCC dated November 9, 1945, referred to in Paragraph 18 of defendant's answer. That the petitioners had actual knowledge of the above matters at the time said matters were taking place, and that under the law, petitioners had the right to intervene as parties at interest in Docket No. 6534, the same as Southern Broadcasting Stations, Inc. had intervened in Docket No. 5903.

26. That at the time petitioners entered into said contract of April 15, 1943 with defendant, they knew that the operation of said radio station depended upon the grant of a license to so operate from the FCC, and that said opera [fol. 34] tion was subject to federal regulation and control under the Communications Act of 1934, as administered by the FCC. Petitioners also knew that under said Communications Act of 1934 the FCC had jurisdiction over any contract or agreement affecting the operation of a radio station in the public interest or affecting the present or future financial ability of a radio station to operate in the public interest. That the FCC in its orders of September 19, 1945 and November 9, 1945 (Exhibits "H" and "J") found the contract of April 15, 1943 to be such a contract over which it had jurisdiction. That the FCC had jurisdiction over the subject matter and over said contract.

27. That the sum of $149,408.38 paid to petitioners under said contract prior to the orders of the FCC of September 19, 1945 and November 9, 1945 (Exhibits "H" and "J") was substantially in excess of the fair market value as of April 15, 1943 of all physical properties, equipment and other assets received by defendants from petitioners or Southern Broadcasting Stations, Inc.

28. That the license under which radio Station WGST was operating in April of 1943 was a temporary license and extension of its prior license. That said license and extension has expired. That the license under which Station WGST has operated since March 7, 1946 was predicated upon a disaffirmance by defendant of the contract of April 15, 1943 with petitioners, and defendants could not have acquired its license to operate, and could not have operated legally, had it not disaffirmed said contract.

[fol. 35] Wherefore, having fully answered, defendant prays that it be dismissed hence and with its reasonable costs.

Eugene Cook, Attorney General of Georgia, Hamilton Lokey, Deputy Assistant Attorney General of Georgia.

(*b*) Power: (1) Night 1000 watts.

(2) Day 5000 watts.

(*c*) Hours of operation Unlimited

(Should be stated exactly as in existing license)

(*d*) Call letters WGST

16. If application is for renewal of special broadcast station license, supply the following information and attach to this application a supplemental report setting forth—

(*a*) Comprehensive summary of all research and experimentation conducted

(*b*) Conclusions and outline of proposed program for further research and development

(*c*) Number of hours operated, and the percentage of these hours sponsored programs were broadcast

(*d*) Fidelity characteristics of the equipment, including the transmitter, studio equipment, and telephone lines over which programs are regularly carried from the studio to the transmitter and the methods used to determine such characteristics

Under existing license, state—

(a) Average percent of time per month, devoted to—

Commercial programs		Sustaining programs	
(1) Entertainment	42.21%	(1) Entertainment	37.3%
(2) Educational	5.63%	(2) Educational	4.91%
(3) Religious		(3) Religious	2.50%
(4) Agricultural		(4) Agricultural	1.21%
(5) Fraternal		(5) Fraternal	1.01%
(6) News	3.61%	(6)	1.62%

(b) Average number of hours sold per month before 6 p. m. 188, after 6 p. m. 104

(c) Average number of hours used per month in interest of applicant 2 hrs. educational

(d) Average number of hours per month station has operated during present license period 544.42

(1) Before 6 p. m. 360.42 (2) After 6 p. m. 184.

(e) Does applicant sell time? Yes

(f) If applicant does not sell time, how is station supported? ____

(g) Average number of hours per month of sponsored program is 282, of which direct advertising programs is 42.3 hours.

(h) Are merchandise prices quoted in interest of applicant? No, or others? Yes

(i) Average amount of money per month spent for—

(1) Talent, $ 1,208.08 (2) Other purposes, $ 12,422.00

(j) Average gross income per month from station operation, $ 22,329.00

8. Description of transmitting apparatus which is now licensed and for which a renewal of license is requested.

(a) Make RCA Type No. 5-C Serial No. BC-1548

(b) Oscillator: Type of circuit Crystal-RCA Type UL-4252-A Temperature Controlled / Number, manufacturer's name, and type of tubes Two RCA 843 Tubes

Actual plate current per tube 14 to 20 milliamperes / Plate voltage 240-275 volts

(c) Last radio stage: Number, manufacturer's name, and type of tubes

Two RCA 892 Tubes

Actual night operation—Plate current per tube 0.36 amp Plate voltage 7200

If greater day power than night power is authorized, specify the following

(e) Modulator or last audio stage: Number, manufacturer's name, and type of tubes ___

Four RCA 845 Tubes

Actual plate current per tube 45 milliamperes Plate voltage 1,000

(e) What maximum percentage of modulation is maintained during regular operation? 100

(f) What modulation measuring device is used to determine that this percentage of modulation is maintained? General Radio Type 731-A Monitor

(g) Specify manufacturer's name, type number, and full scale reading of the following meters:

(1) In last radio stage:

Plate voltmeter Westinghouse Type KX 15,000 volt Serial No. 1,278,993

Plate ammeter Westinghouse Type KX 2.5 amp. Serial No. 1,278,580

(2) Antenna ammeter Weston Model 640-12.5 amp Serial No. 907

(h) Antenna current for authorized operation: Night 4.32 amperes. Day 9.65 amperes.

(i) Maximum operating carrier power output of transmitter for satisfactory operation is 5000 watts.

(j) Maximum rated carrier power of transmitter as determined by orders of the Commission is 5000 watts.

(k) State name and type number of frequency monitor in operation General Radio Model 575-D Oscillator-Model 581, Deviation Meter

(l) When was the last check of this monitor made with an external standard 12-26-39

(m) How often are the checks of the calibration made Weekly

(n) Are all operating values specified above regularly maintained? Yes

If not, give full details

10. (a) In what respect, if any, does the apparatus, antenna, or operation differ from that described in the last application for license or renewal of license? None

(If none, so state)

(b) If any changes whatsoever have been made in the fundamental audio or radio circuit of the transmitter affecting the schematic diagram heretofore filed with the Commission, the appli

(b) Under laws of what State or country is such corporation organized? _____
(A copy of the articles of incorporation properly certified by the Secretary of State shall be attached if not heretofore filed with the Commission)

(c) Is more than one-fourth of capital stock of such corporation owned of record or may it voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country? _____

(d) Is any director or officer of such corporation an alien? _____ If so, state name, citizenship, and position of each _____

(e) Is the above-described controlling corporation in turn a subsidiary? _____ If so, attach additional sheets answering questions 8 (a) to (d), inclusive, for each company to and including the organization having final control.

a) If application is made in behalf of a copartnership, there must be filed a certified copy of the articles of copartnership (unless heretofore filed).

b) If application is made in behalf of an unincorporated association, there must be filed a certified copy of the articles of association and bylaws (unless heretofore filed), showing the purpose of the association.

Applicant must also show—

(1) The names, addresses, and citizenship of the officers and the offices held by each _____

M. L. Brittain, President of Georgia School of Technology, whose address is 204 North Avenue, Atlanta, Georgia, a citizen of the United States of America by birth, is appointed by the Regents of the University System of Georgia.

(2)

10. (a) Is applicant directly or indirectly, through stock ownership, contract, or otherwise, interested in the ownership or control of any other radio broadcasting stations? No

(b) If so, state call letters and location of such stations None

(c) Has the applicant in the past been directly or indirectly interested in the ownership or control of any radio broadcasting stations? No

(d) If so, state call letters and location of such stations None

11. (a) State applicant's relation to station (whether applicant is owner or lessee, and, if neither owner nor lessee, state nature of applicant's interest in use and control of station) (If not owner, a

copy of agreement showing applicant's interest in station must be attached if not heretofore filed with the Commission)

(b) If applicant is not owner of station, who is? Applicant

(c) Does applicant have absolute control of station, both as to physical operation and programs broadcast? Applicant has supervision of programs and operation. Employment contract on file with F.C.C.

(If not, attach copy of any contract which may in any way affect applicant's right to do so)

12. Attach detailed financial statement showing applicant's assets and liabilities and state fully the facts showing applicant's financial responsibility with respect to the operation of station.

13. (a) Has the applicant been finally adjudged guilty by any Federal court of unlawfully monopolizing, or attempting unlawfully to monopolize, radio communication, directly or indirectly, through control of manufacture or sale of radio apparatus, exclusive traffic arrangements, or any other means, or of unfair methods of competition? No

(b) Is applicant directly or indirectly controlled by any party finally adjudged guilty as above stated?

No

(Answer yes or no)

14. File number and date of license sought to be renewed B-S-R-411. Aug. 8, 1939

15. The existing license authorizes the use of—

(a) Frequency 880 kilocycles.

(b) Conclusions and outline of proposed program for further research and development .....

.....

.....

.....

(c) Number of hours operated, and the percentage of these hours sponsored programs wer broadcast .

.....

(d) Fidelity characteristics of the equipment, including the transmitter, studio equipment, and telephone lines over which programs are regularly carried from the studio to the transmitter and the methods used to determine such characteristics .....

.....

.....

.....

544.42

(1) Before 6 p. m. 360.42 (2) After 6 p. m. 184.

(e) Does applicant sell time? Yes

(f) If applicant does not sell time, how is station supported? ____

(g) Average number of hours per month of sponsored program is 282 , of which direct advertising programs is 42.3 hours.

(h) Are merchandise prices quoted in interest of applicant? No , or others? Yes

(i) Average amount of money per month spent for—

(1) Talent, $ 1,208.08 (2) Other purposes, $ 12,422.00

(j) Average gross income per month from station operation, $ 22,329.00

Description of transmitting apparatus which is now licensed and for which a renewal of license is requested.

(a) Make RCA Type No. 5-C Serial No. BC-1548

(b) Oscillator: Type of circuit Crystal-RCA Type UL-4252-A Temperature Controlled / Number, manufacturer's name, and type of tubes Two RCA 843 Tubes

Actual plate current per tube 14 to 20 / milliamperes Plate voltage 240-275 volts

(c) Last radio stage: Number, manufacturer's name, and type of tubes

Two RCA 892 Tubes

Actual night operation—Plate current per tube 0.36 amp Plate voltage 7200

If greater day power than night power is authorized, specify the following:

Actual day operation—Plate current per tube 0.75 amps Plate voltage 15,750

Describe fully the method and procedure of reducing power at sunset By means of relay switching the final plate voltage is reduced to ½ the normal value; simultaneously, the plate voltage of the modulated amplifier is reduced to an optimum value. At the same time, a load resistor is added to the modulator output to maintain a constant load.

(g) Antenna manufactured ..... Serial No. .....

(h) Antenna current for authorized operation: Night 4.32 amperes. Day 9.65 amperes.

(i) Maximum operating carrier power output of transmitter for satisfactory operation is 5000 watts.

(j) Maximum rated carrier power of transmitter as determined by orders of the Commission is 5000 watts.

(k) State name and type number of frequency monitor in operation General Radio Model 575-D Oscillator-Model 581, Deviation Meter

(l) When was the last check of this monitor made with an external standard 12-26-39

(m) How often are the checks of the calibration made Weekly

(n) Are all operating values specified above regularly maintained? Yes

If not, give full details .....

19. (a) In what respect, if any, does the apparatus, antenna, or operation differ from that described in the last application for license or renewal of license? None
(If none, so state)

(b) If any changes whatsoever have been made in the fundamental audio or radio circuit of the transmitter affecting the schematic diagram heretofore filed with the Commission, the applicant represents that there is attached an accurate corrected diagram.

20. (a) Type of antenna Vertical

(b) Height of vertical lead 279 feet.

(c) Length of flat top (if any) None feet.

(6)

(e) Counterpoise (if used) type and dimensions None

(f) Antenna ground (if used) how obtained? 180 radials 300 ft. long

21. (a) Give maximum height (in feet) of towers or antenna above ground level: 289 ft.

(b) Are towers painted and marked with signal lights to conform with specifications of Department of Commerce (see Aeronautics Bulletin No. 474)? Yes

22. Location of transmitter: State Georgia County Fulton

City or town Near Atlanta Street and number Cheshire Bridge Road at Seaboard Ry.

North latitude: Degrees 33 , minutes 48 , seconds 38.4

West longitude: Degrees 84 , minutes 21 , seconds 44

23. Location of main studio: State Georgia County Fulton

City or town Atlanta Street and number 90 Forsyth St.

Other studios None

24. Specify actual periods station has been operated since effective date of existing license:

	A.M.	P.M.	Total daily hours
Sunday	7:45	12 midnight	16¼
Monday	6:00	12 "	18
Tuesday	6:00	12 "	18
Wednesday	6:00	12 "	18
Thursday	6:00	12 "	18
Friday	6:00	12 "	18
Saturday	6:00	12 "	18

25. If station shares time, give following data:

(a) Shares with what stations? None

(b) Does applicant represent that the time-sharing agreement (in triplicate) attached complies with the orders of the Commission? _____ If not, give explanation _____

(Yes or no)

of Commerce (see Aeronautics Bulletin No. 474)? Yes

22. Location of transmitter: State Georgia County Fulton

City or town Near Atlanta Street and number Cheshire Bridge Road at Seaboard Ry.

North latitude: Degrees 33 , minutes 48 , seconds 38.4

West longitude: Degrees 84 , minutes 21 , seconds 44

23. Location of main studio: State Georgia County Fulton

City or town Atlanta Street and number 90 Forsyth St.

Other studios None

24. Specify actual periods station has been operated since effective date of existing license:

	A.M.	P.M.	Total daily hours
Sunday	7:45	12 midnight	16¼
Monday	6:00	12 "	18
Tuesday	6:00	12 "	18
Wednesday	6:00	12 "	18
Thursday	6:00	12 "	18
Friday	6:00	12 "	18
Saturday	6:00	12 "	18

25. If station shares time, give following data:

(a) Shares with what stations? None

(b) Does applicant represent that the time-sharing agreement (in triplicate) attached complies with the orders of the Commission? _____ If not, give explanation _____
(Yes or no)

26. Does station obtain programs from what is known as a "chain"? Yes

(a) Name of chain or chains Columbia Broadcasting System

(b) What is total hours per month of chain programs (i. e., programs, both paid or sustaining, which are duplicated by any other station)? _____

(c) The programs of what other regular broadcast stations, if any, are normally rebroadcast?

None

Total hours of rebroadcast programs during present license period None

27. (a) Attach program for week last preceding date of this application.

(b) Are phonographic records used? Yes If so, how many hours per month?

(c) Are other mechanical reproductions used? Yes If so, how many hours per month?

28. Is continuous watch maintained on ship-calling channel during operative hours? .....

29. Applicant's last application for station license is to be considered as part of this application and the truth of the statements therein contained is hereby reaffirmed, except insofar as the contrary expressly appears herein, and in the following particulars: None

30. Applicant waives any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests a renewal of applicant's existing license in accordance with this application.

Dated this 31st day of January , 1940

GEORGIA SCHOOL OF TECHNOLOGY

(Must correspond with Item 1) Applicant.

By M. L. Brittain,

President

(Be sure all necessary information is furnished) Official.

STATE OF GEORGIA
COUNTY OF FULTON } ss:

M. L. BRITTAIN, being first duly {sworn, upon his oath / affirmed according to law,

deposes and says that he is the President of the Georgia School of Technology

(If applicant is not an individual, state relation of affiant to applicant)

above-named applicant, and that the facts stated in the foregoing application and all exhibits attached thereto are true of his own knowledge, except as to such statements as are therein stated on information and belief, and as to such statements he believes them to be true.

M. L. Brittain

[fol. 44] EXHIBIT "B" TO ANSWER

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

B-170

File No. B3-R-411

Docket No. 5903

In re Application of GEORGIA SCHOOL OF TECHNOLOGY (WGST) ATLANTA, GEORGIA. For Renewal of License.

Appearances

Honorable Ellis G. Arnall, Attorney General for the State of Georgia; *John E. McClure, Esq.*, Special Attorney General for the State of Georgia; *Louis G. Caldwell, Esq.*, Special Assistant Attorney General for the State of Georgia; *Reed T. Rollo, Esq.*, Special Assistant Attorney General for the State of Georgia; and *Samuel D. Hewlett, Esq.*, Special Assistant Attorney General for the State of Georgia; on behalf of the applicant.

George B. Porter, Esq., and *Clarence H. Calhoun, Esq.*, on behalf of Southern Broadcasting Stations, Inc., Intervener.

Marcus Cohn, Esq., and *Russell Rowell, Esq.*, on behalf of the Commission.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF THE COMMISSION

Preliminary Statement

This proceeding arose upon an application, dated January 31, 1940, of Georgia School of Technology for a renewal license for operation of radiobroadcast station WGST, Atlanta, Georgia. Not being satisfied, upon examination of the application, that public interest, convenience or necessity would be served by the granting thereof, the Commission, on August 28, 1940, designated the matter for hearing. The hearing notice issued September 6, 1940, specified the following issues:

1. To determine whether applicant, while holding a license for this station has assumed the responsibil-

ities and discharged the duties of a licensee of a radiobroadcast station as required by the Act and the Commission's rules and regulations.

2. To determine whether applicant, either directly or indirectly, has transferred, assigned, or in any manner disposed of any of the rights granted in the station's license to any other person, firm or corporation, without having obtained the written consent of the Commission, in violation of the Communications Act of 1934, as amended, particularly Section 310(b) thereof.

[fol. 45] 3. To determine whether the station has been operated by any person without a license to do so granted by this Commission, in violation of the Communications Act of 1934, as amended, particularly Section 301 thereof.

4. To determine whether the granting of this application and the continued operation of the station will serve public interest, convenience and necessity.

On October 9, 1940, the issues were supplemented by adding thereto the following:

1. To determine the sources of funds for past and proposed construction, maintenance and operation of the station.

2. To determine whether applicant is financially qualified to operate the station.

The hearing was conducted before a duly qualified officer of the Commission on December 1-5, 1941, January 7-12, 1942, February 2-7, 1942, March 26, 1942, and April 24, 1942.

Findings of Fact

1. Georgia School of Technology, the applicant herein, is a major unit of the University System of Georgia, which is administered by a Board of Regents of sixteen members, including the Governor of the State and fifteen members appointed by him and confirmed by the State Senate. One appointment is for a term to be determined at the will of the Governor; and the other appointments are for six-year terms, arranged so as not to run concurrently.

2. Station WGST is a standard radiobroadcast station, presently allocated to operate on the regional frequency 920

kilocycles, with 1 kilowatt power night, 5 kilowatts day, unlimited hours of operation, located at Atlanta, Georgia.

3. The applicant acquired Station WGST in July 1923 from Clark Howell, Sr., publisher of the *Atlanta Constitution* and member of applicant's Board of Trustees, as a gift for the purpose, among others, of instructing students in radio. At that time the station was licensed under authority of the Department of Commerce to operate with a wave length of 270 meters, 500 watts power. The station has been considered as an endowment of applicant and is listed as such in its catalogue.

4. The operation of Station WGST was conducted by applicant's Experimental Engineering Department for a few years, but apparently difficulties were experienced in maintaining interest in its service. Thereafter the station was operated with the aid of certain young men who were employed to operate it for the applicant. Operation under this arrangement did not meet with much success, and on January 6, 1930, the applicant, through its Board of Trustees, made a contract with Southern Broadcasting Company, a partnership composed of William A. Clarkson, Walt Dob- [fol. 46] bins, and A. S. Foster, to operate the station for all except two hours per week of its alloted time for a period of ten years. The operating assignment of Station WGST, as then authorized under license from the Federal Radio Commission, was 890 kilocycles, 250 watts power, sharing time equally with Station WMAZ, Macon, Georgia.

5. The contract of January 6, 1930, included a declaration that Southern Broadcasting Company should operate Station WGST in all respects in conformity to the present and all future enacted laws of the Congress of the United States and regulations lawfully made in pursuance thereof. It was agreed that Southern Broadcasting Company should arrange the programs and attend to all details in connection therewith, but not allow any programs to be broadcast which were obnoxious or detrimental to the interests of the applicant, the applicant's president to be the judge as to what was obnoxious or detrimental. The contract provided that Southern Broadcasting Company should receive all the gross receipts of the station for the first 90 days of the contract period, and thereafter, all but 5% of the gross receipts for the first year, all but 6% for the second year, all but 7%

for the third year, all but 8% for the fourth year, and all but 10% for each year thereafter, settlements to be made monthly. The Board of Trustees and the applicant's officials were expressly given the right of access to the records of Southern Broadcasting Company for the purpose of examining and auditing them, and faculty and student body were given the right of access to the station under reasonable rules, subject to such regulations as not to interfere with proper operation of it by Southern Broadcasting Company. The contract provided that Southern Broadcasting Company should pay all expenses of whatever nature attendant upon the efficient operation of the station except the expenses incurred by applicant in producing programs for the two hours per week which it reserved in the contract. It was agreed that Southern Broadcasting Company should have no right to create any liability against the applicant through any contracts which it might make either in connection with construction or operation of WGST, or in connection with the broadcasting of programs thereof. The applicant agreed to cooperate with Southern Broadcasting Company to the extent of not attempting to limit the use of Station WGST in any fair and legitimate form of commercial activities, and at the same time it was agreed by both parties that the making of the contract should not release the licensee from its right and duty of exercising general control over the station under its license from the United States Government. The contract further provided that the applicant should not have any liability to Southern Broadcasting Company in the event of the cancellation of its license by the United States Government or any other action taken by the United States Government or its officers, boards or bodies regarding the use of radio stations.

6. On December 13, 1930, the applicant and Southern Broadcasting Stations, Inc., which had succeeded to the rights of Southern Broadcasting Company, agreed upon a stipulation to the effect that the applicant retained control of the operation of Station WGST with respect to the manner and means of its operation and of the physical equipment connected therewith, that the applicant retained control of all programs broadcast over the station, and that it would, through its proper officers and designated repre-

sentatives, exercise its right to approve all of the programs broadcast over the station at all times.

. . . . . .

[fol. 47] Applicant maintained supervision of programs and operation. The evidence with reference to the filing of applications shows that the application under consideration and prior applications were prepared by officers or employees of Southern Broadcasting Stations, Inc., and brought to the applicant's president merely for the signature and verification necessary for the filing of the same. It is apparent from the evidence regarding this matter that the applicant did not have in its possession adequate information to prepare the applicatons if it had undertaken to do so. Statements of its own witnesses show that it has not kept books, program logs, or records of any kind regarding the operation of the station.

10. After the action of the Commission designating the application under consideration for hearing, at a time approximately three or four months prior to the hearing, the management of Southern Broadcasting Stations, Inc., began the practice of sending the completed, published program schedule of Station WGST to the applicant; prior to that time the applicant's executive officer, designated to administer its responsibilities in connection with operation of the station, had no advance notice whatever as to what program material was to be broadcast and no information as to the programs broadcast except such as he might acquire through hearing a program from the station over the air. The applicant has not been consulted in connection with the purchase of equipment and apparatus used in the operation of the station, and since 1930 has made no contribution whatever for installation or maintenance of equipment in accordance with the standards prescribed in the regulations of the Commission. All arrangements for program material, excepting only a half-hour weekly program entitled "Georgia Tech Round Table of the Air", are made by Southern Broadcasting Stations, Inc., practically without reference to the applicant. The contract under which Station WGST obtains network programs from Columbia Broadcasting System is a contract

between the network and Southern Broadcasting Stations, Inc. Likewise, arrangements for news services, transcription services, and for employment of talent are arrangements which have been made by Southern Broadcasting Stations, Inc., without consultation with or approval of the applicant. The card rates of the station are established by Southern Broadcasting Stations, Inc., and at the date hearings began on the instant application, the executive officer responsible for administration of the applicant's interest and responsibilities, had not seen a schedule of rates and was uninformed as to the rates charged for the services of the station. The same officer was uninformed as to what the station's policy or practice might be with respect to whether or not certain types of advertising should be accepted.

11. The entire operating staff is provided by Southern Broadcasting Stations, Inc., and with few exceptions, the employees are practically unknown to applicant's executive officer. Mail addressed to applicant as licensee of WGST, including communications from the Commission, is referred, unopened, to Southern Broadcasting Stations, Inc., and along with mail addressed to Station WGST is received and handled as a matter of general practice by the operating company on its own responsibility.

12. The original equipment of Station WGST has been entirely replaced with equipment supplied by Southern Broadcasting Stations, Inc. While the transmitter and antenna are located on land which has been deeded to the applicant, pursuant to a demand made under the provisions of the contract of June 18, 1936, ownership of the apparatus is claimed by Southern Broadcasting Stations, Inc. The lease of studio facilities at another location is held by Southern Broadcasting Stations, Inc.

[fol. 48] 13. Substantially the only reports which have been made to the applicant in its position as licensee, concerning the operation of WGST have been monthly statements as to its share of the receipts, usually, merely the submission of a check with a notation such as "Royalty for December". The annual return increased from $2,026.19 for 1930, to $12,256 for 1935, and to $29,943.20 for 1940. Payments under the contract have been received over the greater part of the time without question, but when the

(P. 48) 6534-2

EXHIBIT "D" TO ANSWER

Form No. 303
(Revised Feb. 10, 1942)

File No. BS-Z-1441
Call Letters WGST

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION

APPLICATION FOR RENEWAL OF STANDARD BROADCAST STATION LICENSE

Submit in triplicate direct to the Federal Communications Commission, Washington, D. C. Swear to at least two copies.

Before executing application, see Communications Act of 1934, as amended, Part I (Rules of Practice and Procedure), Part III (Standard Broadcast Rules) and sec. 44.1 of the Commission's Rules and Regulations, and the Standards of Good Engineering Practice Concerning Standard Broadcast Stations.

To the Federal Communications Commission:

1. Name of applicant[1] Georgia School of Technology

2. Post-office address: Street and number North Avenue at Cherry Street

City Atlanta State Georgia

3. Is applicant a citizen of the United States? Yes

4. Is the applicant a representative of an alien or foreign government? No

5. Give the file number and date of the license sought to be renewed BS-Z-1441 - Dec. 20, 1938.

6. Operation authorized by the existing license and for which renewal of license is requested:

   (a) Frequency 920 kilocycles.

   (b) Power: (1) Night 1000 watts. (2) Day 5000 watts.

   (c) Hours of operation Unlimited

   (Should be stated exactly as in existing license. Time-sharing stations, limited time stations, and stations rebroadcasting programs of others shall file documents as specified by sections 3.74, 3.88 and 3.408, subsection (b), footnote 3, Rules of Practice and Procedure, respectively.)

7. (a) Do the reports filed by applicant under sec. 1.361 of the Rules of Practice and Procedure reflect substantially applicant's status with regard to all conditions stated in such reports as of the date this application was executed?[2] No. See Exhibit attached
   (Answer yes or no)

present application came up for hearing, the applicant, through its representatives, had asserted claims for additional amounts, claiming that its "royalties" should have been calculated on the basis of total receipts of Southern Broadcasting Stations, Inc., rather than after deductions for agency commissions, charges for talent on certain programs, and other similar items. The applicant had also asserted a claim for additional amounts due as its share of gross receipts from sales in which due bills had been accepted but not entered in the operating company's books.

14. The evidence discloses that over a long period of time, and without the applicant's knowledge or approval, Southern Broadcasting Stations, Inc., transacted a considerable volume of business involving the use of due bills; that due bills in substantial amounts received in such transactions were applied upon purchases of automobiles, jewelry, flowers, other merchandise, school tuition, and rent for the benefit of stockholders and officials of Southern Broadcasting Stations, Inc.; and that none of the sales made on this basis had been included in the determination of gross receipts for the purpose of calculating payments due the applicant under its contract. On November 28, 1941, as a result of the claims made during the pendency of the hearing, Southern Broadcasting Stations, Inc., submitted a supplemental statement of income for the year 1940 showing due bills in the amount of $14,618.10, and made an additional payment of $1,461.81 to the applicant. The applicant found it difficult to obtain information concerning due bill transactions for any period prior to 1940 owing to incompleteness of the available records or inability or refusal of officers of Southern Broadcasting Stations, Inc., to produce the same. An effort was made in November 1941 to trace due bill accounts through the station logs, but was defeated when logs could not be found for any period prior to January, 1940.[1]

15. Southern Broadcasting Stations, Inc., in its Petition to Intervene which was granted September 5, 1941, alleged that it owned all of the equipment used in the operation of Station WGST save alone the title to the ground on

[1] Commission's Rules, Section 3.405, require that logs be retained by the licensee for a period of two years.

which it is situated, and that it had in its possession all records, papers, contracts, and books of account pertaining to the operation of this station. The facts which the evidence shows regarding Southern Broadcasting Stations, Inc., indicate the part which this corporation and its officers and stockholders have had in the operation of Station WGST. The corporation was organized by Messrs. William A. Clarkson, Walt Dobbins and A. S. Foster, to succeed the partnership known as Southern Broadcasting Company. In December 1929, or early in 1930, Mr. C. H. Calhoun was engaged to do some legal work in connection with the organization of the corporation and acquired an interest through acceptance of [fol. 49] stock in lieu of payment for his fee for legal services and loans of money which he had advanced, the total indebtedness being about $750. Mr. W. E. Carroll, Atlanta, Georgia, became interested in the corporation in the early part of 1930, as a result of loans which he made to the organization. He paid in $1,500 for some 2,000 shares, the number of shares issued to him being reduced later in a redistribution of stock. Shortly after Calhoun acquirred his interest, he met Mr. Sam Pickard through his dealings with Columbia Broadcasting System, of which Mr. Pickard was vice president and director of station relations. Pickard became interested in Southern Broadcasting Stations, Inc., paying $5,000 for 5,000 shares of stock out of 8,800 shares then issued. The certificate for this stock was issued June 17, 1930. In September 1932, an associate of Mr. Pickard in the organization of the Columbia Broadcasting System, acquired 1,176 shares from Walt Dobbins. This stock, which was the last held by any of the original stockholders, was transferred to Mrs. Hattie Pickard in October 1935. The balance sheet of the corporation, as of November 1941, shows total assets of $186,181.34, and net worth of $132,862.81. There are 8,824 shares of capital stock issued, which are held as follows: Sam Pickard and members of his family, 6,176 shares, 69.99%; C. H. Calhoun, 1,472 shares, 16.68%; and W. E. Carroll, 1,176 shares, 13.32%. Mr. Pickard is employed as executive manager at $12,000 a year and receives a bonus of $15,000, provided the station makes $60,000 net for the stockholders. Mr. Calhoun is president of the corporation and is employed as general manager, receiving a salary of approximately $5,000 per annum. In 1940, these stockholders received salaries, dividends, bon-

nd other payments in the total amount of $113,080.50. vidence indicates that from the investments made 1930 to 1935, the present stockholders have realized ırn of approximately $500,000.

After the application for a renewal license for opera- f Station WGST was designated for hearing, a com- was appointed by the Board of Regents to undertake ations with Southern Broadcasting Stations, Inc., e purpose of securing changes in operating arrange- and practices to meet the issues raised in the notice ring. On eight different occasions the hearing of se was continued on petition of the applicant. ghout the course of these negotiations, which included eration of twenty or more proposed contractual ar- nents, Southern Broadcasting Stations, Inc., insisted maintenance of its freedom of action and a large f the income of the Station, finally refusing an ar- ment which would have given it 33⅓% of the income payment of salaries of $10,000 each to Pickard and un. The applicant's representatives found it difficult ertain the earnings of the station which it was licensed erate, obtaining such information as they did obtain bit, after repeated requests. Members of the com- were given to understand that arrangements would o be made with Southern Broadcasting Stations, Inc., either controlled or owned the equipment of the sta- nd also its network contract.[1]

3)] 17. In July 1941, while the Committee of the of Regents was negotiating with Southern Broad- g Stations, Inc., Messrs. Arthur Lucas and William nkins submitted an offer for a contract to operate the n in a letter addressed to the Governor of the State. rm of Lucas and Jenkins proposed to acquire the

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ontract signed February 15, 1934, by Sam Pickard alf of Columbia Broadcasting System, Inc., and C. H. un in behalf of Southern Broadcasting Stations, Inc., enewed February 15, 1939, for a term expiring August 4, subject to cancellation by Columbia on three years' . This contract was signed H. B. Akerberg for Colum- alhoun for Southern.

30. Applicant waives any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests a renewal of applicant's existing license in accordance with this application.

Dated this 31st day of January, 1940.

GEORGIA SCHOOL OF TECHNOLOGY
(Must correspond with item 1) Applicant.

By M. L. Brittain,
President
(Be sure all necessary information is furnished) Official.

STATE OF GEORGIA
COUNTY OF FULTON } ss:

M. L. BRITTAIN, being first duly { sworn, upon his oath / affirmed according to law,

deposes and says that he is the President of the Georgia School of Technology
(If applicant is not an individual, state relation of affiant to applicant)
above-named applicant, and that the facts stated in the foregoing application and all exhibits attached thereto are true of his own knowledge, except as to such statements as are therein stated on information and belief, and as to such statements he believes them to be true.

M. L. Brittain
Affiant.†

Subscribed and sworn to before me this 31st day of January, 1940

[SEAL]

Grace H. Waits
Notary Public.

(Notary public's seal must be affixed where law of jurisdiction requires, otherwise state that law does not require seal.)

My commission expires [illegible] Large
~~[illegible] Expires May [illegible], 1940~~

† Must be subscribed and verified by party applicant, by one of the parties if more than one, by an officer if applicant is a corporation, or by attorney of applicant only under the provisions of rule 106.34 which must be fully explained.

(8)

[illegible] U. S. GOVERNMENT PRINTING OFFICE

physical properties and plant of Station WGST by paying therefor the reasonable or true value of same or to erect and equip the station with the latest and most desirable broadcast facilities of a modern 5,000-watt station, operate the same and guarantee the applicant not less than $50,000 per year as the licensee's part of the profits from the operation. Lucas and Jenkins, according to testimony of both members of the firm, operate forty to fifty moving-picture theaters in the State of Georgia and have interests in five radio broadcast stations as follows: WRDW, Augusta; WSAV, Savannah; WLAG, La Grange; WMOG, Brunswick; WALB, Albany.[1] Lucas and Jenkins have attempted to secure an interest in WGST for some time, as indicated by offers to purchase or operate the station made in 1932 and again in 1936. They are also interested in a pending application for a permit to construct a new broadcast station at Columbus, Georgia.

18. Following the submission of the Lucas and Jenkins offer, it was suggested by representatives of the Committee, acting for the applicant and the Governor of the State, that it would be advisable for Southern Broadcasting Stations, Inc., and Lucas and Jenkins to combine their interests so that both might participate in such arrangements as might be made for the management of WGST. On August 10, 1941, Southern Broadcasting Stations, Inc., offered to sell Lucas and Jenkins a one-fourth interest in such arrangement as it might make for operation of WGST for $45,000, it being understood that Lucas and Jenkins should withdraw any offer theretofore made for operation of the station. On the same date, William K. Jenkins, acting in behalf of the firm of Lucas and Jenkins, notified Southern Broadcasting Stations, Inc., that in accordance with the agreement, the firm was withdrawing all offers which had been made for operation of WGST.

19. There were further negotiations between the applicant and Southern Broadcasting Stations, Inc., continuing to the date of the hearing, but when the applicant began

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[1]Lucas and Jenkins are not shown as holding an interest in WALB in reports of stockholdings and changes therein required under the provisions of Commission Regulations, Section 43.1.

the presentation of its case, it proposed to operate Station WGST through the means of a contractual arrangement with Lucas and Jenkins. This position was maintained until near the termination of the proceedings, when a letter was received from the Governor of Georgia, transmitting a letter from Lucas and Jenkins, withdrawing all offers theretofore made to purchase an interest in or to accept employment relative to WGST.

20. Following the withdrawal of Lucas and Jenkins, the applicant submitted as an exhibit a "Plan for Operation of Station WGST by the Georgia School of Technology." In this document, the applicant proposed to terminate its agreement with Southern Broadcasting Stations, Inc., and take over all equipment used in operation of the station. It declared that it would exercise full and complete con- [fol. 51] trol over the entire operation of the station, including full and complete supervision over all programs broadcast; that it would employ a manager on a salary basis; that the Radio Committee of the Board of Regents would be continued in existence to act as an advisory committee to the president of the Georgia School of Technology; that an adequate staff of employees would be engaged by the Georgia School of Technology; that provision would be made to enable engineering students with proper qualifications to assist operators so that the wishes of the donor of the station might be more fully carried out; and that monthly reports would be submitted to the Commission reporting in detail the steps taken to accomplish the proposed plan of operation until completion of all steps. It was conceded by applicant's representatives that details of the plan had not been worked out and that there was some uncertainty as to the ownership of the WGST equipment, although applicant was advised that it had a legal right to the same. It was further conceded that preparations necessary to put the plan in operation had not been worked out, that the plan was simply a statement of purpose which had been formulated and approved immediately before presentation.

Conclusions

1. The Communications Act of 1934, as amended, states that its purpose is to provide for the use of the channels of interstate and foreign radio transmission by persons for

limited periods of time under licenses granted by Federal authority, and that no person shall use or operate radio transmission apparatus except with a license granted under the provisions of the Act (Section 301). The Act prescribes that the Commission shall grant licenses only upon written application setting forth such facts as the Commission may require as to citizenship, character and financial, technical and other qualifications of the applicant (Section 308). The Commission is directed to grant any applicant a station license, subject to the limitations of the Act, if public convenience, interest, or necessity will be served thereby (Sections 307, 309). The station license, the frequencies authorized to be used by the licensee and the rights granted in the license may not be transferred, assigned, or in any manner disposed of to any person unless the Commission shall, after securing full information, decide that the transfer is in the public interest and shall consent thereto in writing (Section 310).

2. The Rules and Regulations prescribe that application for consent to assignment of license or to transfer control of a corporate license shall be filed at least 60 days in advance of the contemplated effective date of the assignment or transfer, the application to contain such information as the prescribed application form calls for (Section 1.364). The forms of application call for substantially the same information about assignees and transferees as the Commission requires with reference to applicants for new facilities.

3. The Act and the Commission's rules, including but not limited to the provisions cited immediately above, firmly establish the principles that the licensee is and must be responsible for the control and operation of the station, that before becoming a licensee he must show qualifications which satisfy the Commission that as a licensee he will discharge his duties and responsibilities in the public interest, and that the licensee may not transfer to any person his respon- [fol. 52] sibilities as licensee except with the Commission's written consent on written application therefor.

4. In this case, while the present operating agreement with Southern Broadcasting Stations, Inc. contains language purporting to give the licensee the right to control the operations of Station WGST, the actual duties and responsibilities of the licensee with respect to this station have been assumed

by Southern Broadcasting Stations, Inc. to the almost complete exclusion of the station licensee. The Georgia School of Technology as the licensee of WGST has failed to assume the responsibilities and to discharge the duties of the licensee of a radio broadcasting station as required by the Communications Act of 1934, as amended, and the Commission's Rules and Regulations. This failure to comply with the provisions of the Communications Act of 1934, as amended, and the Commission's Rules and Regulations, has been due in some measure to misunderstanding and lack of knowledge rather than to bad faith on the part of the licensee.

5. Under the present circumstances, the license cannot be renewed. However, no useful purpose would be served by refusing to renew the license under any and all conditions. Moreover, a continuation of the program service of Station WGST under proper management will serve the public interest, convenience and necessity.

6. The Commission will consider the issuance of a renewal of the license to Georgia School of Technology provided the Commission is given assurance that the applicant is prepared to and will in fact assume and discharge the full responsibilities of a licensee. Further application for renewal of license in accordance with these conclusions shall be filed with the Commission within sixty days from the date hereof, setting forth the plan of the Station for the acquisition of the necessary facilities and equipment, and for the business management, representation, and control of its future operations, together with a list of all persons to participate therein. In the meantime the Commission will permit the continued operation of Station WGST under temporary extension of license for a period of 90 days from this date.

Federal Communications Commission, T. J. Slowie, Secretary.

[Stamp:] Signed by above. Mailed by Mar. 25, 1943. Mail & Files. J. J. B.

Adopted March 23, 1943.

"Released: Mar. 25, 1943. See Section 1.231 of the Commission's Rules of Practice and Procedure."

CWW v.

[fol. 53] Docket No. 5903

Mailed to the Following: Georgia School of Technology (WGST), Attorney Ellis G. Arnall, John E. McClure, Louis G. Caldwell, Reed T. Rollo, Samuel Hewlett.

Southern Broadcasting Stations, Inc., Clarence H. Calhoun, President, George B. Porter.

[fol. 54] EXHIBIT "C" TO ANSWER

68131

Before the Federal Communications Commission
Washington, D. C.

B-170. Docket No. 5903. File No. B3-R-411

In re Application of GEORGIA SCHOOL OF TECHNOLOGY, (WGST), ATLANTA, GEORGIA, for Renewal of License

Order

The Commission having under consideration the proceedings upon the above-entitled application of Georgia School of Technology (WGST), Atlanta, Georgia, for renewal of license;

It Appearing, That Proposed Findings of Fact and Conclusions of The Commission in the proceedings upon the above-entitled application were made and entered on March 23, 1943, and that no exceptions have been filed thereto;

It is ordered, This 8th day of May, 1943, that the Proposed Findings of Fact and Conclusions of the Commission, heretofore made and entered, be, and they are hereby, made a part hereof by reference and adopted as the findings of fact and conclusions of the commission;

It is further ordered, That the above-entitled application of Georgia School of Technology Be, and it is hereby, denied without prejudice to the filing of a further application for renewal of license in accordance with the conclusions reached in these proceedings, such further application to be filed within 60 days from March 23, 1943, and to set forth the plan of the applicant for the acquisition of the necessary facilities and equipment, and for the business management, representation, and control of its future operations, together with a list of all persons to participate therein;

[fol. 55] It is further ordered, That the outstanding temporary license for the operation of Station WGST, Atlanta, Georgia, Be, and it is hereby, extended for a period of ninety (90) days from March 23, 1943, or until 3:00 a. m., E.S.T., June 21, 1943.

Federal Communications Commission, T. J. Slowie, Secretary.

CWWorthy—CWWb

[Stamp:] Signed by Above. Mailed by May 11, 1943. Mail & Files.

(7.49)

(a) Is applicant now, or has applicant been, party to a proceeding in any Federal court involving the monopolising of, or the attempt to monopolise, radio communication, directly or indirectly, through control of the manufacture or sale of radio apparatus, by exclusive traffic arrangements, or by any other means, or of using unfair methods of competition?

No.
(Answer yes or no)

(b) Is applicant directly or indirectly controlled by any person involved in such proceeding?

No.
(Answer yes or no)

9. (a) In what respect, if any, does the apparatus, antenna, or technical operation differ from that described in the last application for license or renewal of license?

Only in value of antenna resistance. Form 306 filed with FCC Sept. 1942 and approved by it.
(If none, so state)

(b) If any changes whatsoever have been made in the fundamental audio or radio circuit of th transmitter or in the coupling and phasing equipment affecting the schematic diagra heretofore filed with the Commission, the applicant represents that there is attached an accurate corrected diagram. None.
(If none, so state)

10 Specify actual minimum periods during the regular broadcast day (6 a.m. to 12 midnight, local standard time) the station has been operated since the effective date of existing license: [3]

	Before 6 p.m.	After 6 p.m.	Total Minimum Hours Daily
Sunday	7:45 A.M. to 6:00 P.M., 10¼ hr.	6:00 P.M. to Midnight, 6 hrs.	10¼ hrs.
Monday	6:00 A.M. to 6:00 P.M. 12 hrs.	〃 〃	6 hrs. 18 〃
Tuesday	〃 〃	〃 〃	〃
Wednesday	〃 〃	〃 〃	〃
Thursday	〃 〃	〃 〃	〃
Friday	〃 〃	〃 〃	〃
Saturday	〃 〃	〃 〃	〃

11. Under existing license —

(a) State average number of hours per month devoted to commercial programs 225.34

(b) State average number of hours per month used in advertising any business (other than broadcasting) in which applicant is engaged either directly or indirectly None

(c) State average number of hours per month devoted to chain programs, specifying the network

(P. 30) 6-53H-3

(d) State the average percentage of time per month (combined total should equal 100 percent) devoted to—

	Commercial Programs		Sustaining Programs
1.	Entertainment	48.51 %	10.37
2.	Educational	1.05	4.63
3.	Religious	2.73	2.42
4.	Agricultural		.40
5.	Civic[4]		1.96
6.	Governmental[5]	1.23	.46
7.	News	6.18	7.35
8.			
9.	Total	59.40	40.6

2. (a) Are phonograph records used? _____ If so, state average number of hours per month 32.67

(b) Are any other mechanical records (electrical transcriptions, etc.) used? Yes If so, state average number of hours per month 86.33

13.[6] (a) Set forth fully any respects in which the character of the program service proposed is different from that carried on under the existing license as reflected in your answer to section 11. The only changes contemplated in the character of program service involves greater emphasis on programs originating at Georgia School of Technology, utilizing the school's faculty, students and facilities. Applicant intends to devote more time to Georgia Tech programs than formerly. Radio Engineering students of Ga. Tech, properly qualified, will be required to serve as operating personnel of the station.
(If none, so state)

(b) Attach copies of all contracts or give the substance of all understandings of a general nature affecting program service, including (1) chain broadcast contracts, (2) transcription service contracts, (3) bulk time sales contracts, and (4) contracts or understandings which confer upon persons other than the licensee (or employees thereof entirely under the direction of the licensee) any power or authority with respect to the selection or production of programs or the sale of time, even though ultimate determination with respect to such matters is retained by the licensee. See "Exhibit 3" attached.

14.[6] Set forth in an exhibit the name, address, citizenship and experience of each employee of the station having any responsibilities in connection with the technical operation or with programs, showing the position and duties of each. See "Exhibit 3" attached.

1553H-3

4

applicant's last application for station license is to be considered as part of this application and the truth of the statements therein contained is hereby reaffirmed, except insofar as the contrary expressly appears herein, and in the following particulars. _____

Since the issuance on March 25, 1943 of the Proposed Findings of Fact and Conclusions of the Commission on Applicant's Renewal Application (File No. BS-R-411, Docket No. 5903), applicant has purchased all of the outstanding shares of Southern Broadcasting Stations, Inc. Exhibit 4, attached, contains a certified copy of the minutes of April 23, 1943 of Board of Regents of the University System of Georgia authorizing the execution of the contract, in pursuance of which said shares have since been fully acquired and naming its Committee appointed to act for the Board, when the Board itself is not in session, to supervise, direct, and control the operation of Station WSB in behalf of applicant.

By M. L. Brittain
President -
Official.

(Be sure all necessary information is furnished and all questions are fully answered. If any portions of the application are not applicable, specifically so state, and show reasons therefo Defective applications may be returned without consideration.—section 1.72, Rules of Practice and Procedure.)

STATE OF Georgia
COUNTY OF Fulton } ss:

M. L. Brittain, being first duly (sworn upon his oath, (affirmed according to law deposes and says that he is the President
(If applicant is not an individual, state relation of affiant to applicant)
above-named applicant, and that the facts stated in the foregoing application, and all exhibits attached thereto, are true of his own knowledge, except as to such statements as are therein stated on information and belief, and as to such statements he believes them to be true.

M. L. Brittain

session, to supervise, direct, and control the operation of Station WSB in behalf of applicant.

By M. L. Brittain
President -
Official.

(Be sure all necessary information is furnished and all questions are fully answered. If any portions of the application are not applicable, specifically so state, and show reasons therefo Defective applications may be returned without consideration.—section 1.72, Rules of Practice and Procedure.)

STATE OF Georgia
COUNTY OF Fulton } ss:

M. L. Brittain, being first duly (sworn upon his oath, (affirmed according to law deposes and says that he is the President
(If applicant is not an individual, state relation of affiant to applicant)
above-named applicant, and that the facts stated in the foregoing application, and all exhibits attached thereto, are true of his own knowledge, except as to such statements as are therein stated on information and belief, and as to such statements he believes them to be true.

M. L. Brittain
Affiant

Subscribed and sworn to before me this 20 day of May, 1943

Harriet Henderson
Notary public

(SEAL)

(Notary public's seal must be affixed where law of jurisdiction requires, otherwise state that law does not require seal.)

My commission expires _____, 19__.

Notary Public, Fulton County, Georgia
My Commission Expires Feb. 11, 1945

[7] Must be subscribed and verified by party applicant, by one of the parties if more than one, by an officer if applicant is a corporation, or by attorney of applicant only under the provisions of section 1.135 which must be fully explained.

4

(P.52)

...ant's last application for station license is to be considered as part of this application and the truth of the statements therein contained is hereby reaffirmed, except insofar as the contrary expressly appears herein, and in the following particulars. _____

---

16. Applicant waives any claim to the use of any particular frequency, or of the ether, as against the regulatory power of the United States, because of the previous use of the same, whether by license or otherwise, and requests a renewal of its existing license in accordance with this application.

Dated this 20 day of May, 1943

(Must correspond with item 1) Applicant.

GEORGIA SCHOOL OF TECHNOLOGY

By M. L. Brittain

President

Official.

(Be sure all necessary information is furnished and all questions are fully answered. If any portions of the application are not applicable, specifically so state, and show reasons therefo Defective applications may be returned without consideration.—section 1.72, Rules of Practice and Procedure.)

STATE OF Georgia
COUNTY OF Fulton } ss:

M. L. Brittain, being first duly (sworn upon his oath, (affirmed according to law) deposes and says that he is the President

(If applicant is not an individual, state relation of affiant to applicant)

above-named applicant, and that the facts stated in the foregoing application, and all exhibits attached thereto, are true of his own knowledge, except as to such statements as are therein stated on information and belief, and as to such statements he believes them to be true.

M. L. Brittain.

Affiant

Subscribed and sworn to before me this 20 day of May, 1943

(SEAL)

Harriet Henderson

Notary public

[fol. 61] EXHIBIT "E" TO ANSWER

7110A

Federal Communications Commission

Washington 25, D. C.

Docket No. 6534

File No. B3-R-441

NOTICE

In Re Application of: Georgia School of Technology, (WGST).

Date Filed: May 23, 1943.

For: Renewal of License (Main and Auxiliary).

Class of Service: Broadcast.

Class of Station: Broadcast.

Location: Atlanta, Georgia.

Operating Assignment Specified: Frequency, 920 kc; Power, 1 kw night, 5 kw day; Hours of Operation, Unlimited.

You are hereby notified that the commission has examined the above-described application and has designated the matter for hearing for the following reasons:

1. To determine whether the terms, provisions and conditions of the Commission's Proposed Findings of Fact and Conclusions of March 23, 1943, and Order of May 8, 1943, in Docket 5903 are effectuated by the provisions and consummation of the contract entered into between The Regents of the University System of Georgia, on behalf of the licensee, Georgia School of Technology, and the Southern Broadcasting Stations, Inc. of April 15, 1943.

2. To determine the extent to which the former officers, directors, stockholders and employees of Southern Broadcasting Stations, Inc., will participate in the revenues of the station under the contract of April 15, 1943, as heretofore described, and the effect which this participation will have on the overall finances and operation of the station.

3. To determine the consideration given by the former officers, directors, stockholders and employees of Southern

Broadcasting Stations, Inc., in return for the share in the earnings of the station which they will receive under the contract of April 15, 1943, as heretofore described.

4. To determine the value of the equipment owned by, and the assets of, the Southern Broadcasting Stations, Inc. at the time the contract of April 15, 1943, heretofore referred to, was consummated.

5. To determine the degree of influence, control and domination, whether direct or indirect, that the former officers, stockholders, directors and employees of the Southern Broadcasting Stations, Inc. will have on the future operations of WGST.

6. To determine the amount and degree of participation, control and influence The Regents of the University System of Georgia's WGST Radio Committee, and each of its members, will exercise in the operation of the station.

[fol. 62] 7. To determine whether there are any other written or oral contracts, understandings or agreements between the former stockholders, officers, directors or employees of the Southern Broadcasting Stations, Inc. and The Regents of the University System of Georgia, the WGST Radio Committee, or any of their members, in connection with the operation of WGST, or the contract of April 15, 1943, heretofore referred to, which have not been disclosed to the Commission.

8. To determine whether in the light of the Commission's Proposed Findings of Fact and Conclusions and Order in Docket 5903 and the present and future relationship between the Regents of the University System of Georgia, the WGST Radio Committee, the licensee, Georgia School of Technology, and the Southern Broadcasting Stations, Inc., their present and past officers, directors, stockholders and employees, the granting of this application and the continued operations of WGST will serve public interest, convenience and necessity.

The application involved herein will not be granted by the Commission unless the issues listed above are determined in favor of the applicant on the basis of a record duly and properly made by means of a formal hearing.

The applicant is hereby given the opportunity to obtain a hearing on such issues by filing a written appearance in

accordance with the provisions of Section 1.382(b) of the Commission's Rules of Practice and Procedure. Persons other than the applicant who desire to be heard must file a petition to intervene in accordance with the provisions of Section 1.102 of the Commission's Rules of Practice and Procedure.

The applicant's address is as follows: Georgia School of Technology, Radio Station WGST, North Avenue & Cherry Street, Atlanta, Georgia.

Dated at Washington, D. C. Oct. 12, 1943.

By the Commission,

T. J. Slowie, Secretary.

Copies sent to the following: Applicant, John E. McClure, Southern Bldg., Louis G. Caldwell, and Reed T. Rollo, National Press Bldg., Southern Broadcasting Stations, Inc., Att: Clarence H. Calhoun, President, 710 Rhodes Haverty Building, Atlanta, Georgia, George B. Porter, Sam E. Hewlett, Wm. Oliver Building, Atlanta, Georgia, Ellis G. Arnall, Governor, State of Georgia, Atlanta, Georgia.

[fol. 63] [Stamp:] Federal Communications Commission, Nov. 4, 1943. Office of Secretary.

EXHIBIT "F" TO ANSWER

Federal Communications Commission, Washington 25, D. C.

Docket No. 6534

File No. B3-R-411

In Re Application of: Georgia School of Technology, (WGST).

Date Filed: May 22, 1943.

For: Renewal of License (Main and Auxiliary).

Class of Service: Broadcast.

Class of Station: Broadcast.

Location: Atlanta, Georgia.

Operating Assignment Specified: Frequency, 920 kc.; Power, 1 kw night, 5 kw day; Hours of Operation, Unlimited.

Rules and Regulations, and the Standards of Good Engineering Practice Concerning Standard Broadcast Stations.

To the Federal Communications Commission:

1. Name of applicant[1] Georgia School of Technology

2. Post-office address: Street and number North Avenue at Cherry Street

   City Atlanta State Georgia

3. Is applicant a citizen of the United States? Yes

4. Is the applicant a representative of an alien or foreign government? No

5. Give the file number and date of the license sought to be renewed BR-Z-1441 - Dec. 20, 1948.

6. Operation authorized by the existing license and for which renewal of license is requested:

   (a) Frequency 920 kilocycles.

   (b) Power: (1) Night 1000 watts. (2) Day 5000 watts.

   (c) Hours of operation Unlimited

   (Should be stated exactly as in existing license. Time-sharing stations, limited time stations, and stations rebroadcasting programs of others shall file documents as specified by sections 3.74, 3.80 and 3.408, subsection (b), footnote 3, Rules of Practice and Procedure, respectively.)

7. (a) Do the reports filed by applicant under sec. 1.361 of the Rules of Practice and Procedure reflect substantially applicant's status with regard to all conditions stated in such reports as of the date this application was executed?[2] Yes. See Exhibit 1 attached
   (Answer yes or no)

   (b) If not, submit a separate statement herewith showing changes.

   (c) Has applicant filed the report and the necessary supplemental reports required by sec. 43.1 of the Rules? Yes. Copy of latest report attached, marked "Exhibit 2"
   (Answer yes or no)

---

[1] Name of applicant must be identical with that shown in current license.

[2] Action upon this application will be held in abeyance, pending the filing of such reports, if delinquent.

rnat described in the last application for license or renewal of license?

Only in value of antenna resistance. Form 306 filed with FCC Sept. 1942 and approved by it.
(If none, so state)

(b) If any changes whatsoever have been made in the fundamental audio or radio circuit of th transmitter or in the coupling and phasing equipment affecting the schematic diagram heretofore filed with the Commission, the applicant represents that there is attached an accurate corrected diagram. None.
(If none, so state)

10 Specify actual minimum periods during the regular broadcast day (6 a.m. to 12 midnight, local standard time) the station has been operated since the effective date of existing license:[3]

	Before 6 p.m.		After 6 p.m.		Total Minimum Hours Daily
Sunday	7:45 A.M. to	6:00 P.M., 10¼ hr.	6:00 P.M. to	Midnight, 6 hrs.	16¼ hrs.
Monday	6:00 A.M. to	6:00 P.M., 12 hrs.	"	"	6 hrs. 18 "
Tuesday	"	"	"	"	"
Wednesday	"	"	"	"	"
Thursday	"	"	"	"	"
Friday	"	"	"	"	"
Saturday	"	"	"	"	"

11. Under existing license

(a) State average number of hours per month devoted to commercial programs 225.34

(b) State average number of hours per month used in advertising any business (other than broadcasting) in which applicant is engaged either directly or indirectly None

(c) State average number of hours per month devoted to chain programs, specifying the network organization furnishing same:

Commercial Programs	Sustaining Programs
181 hrs. Columbia Broadcasting System	126.67 Columbia Broadcasting System

[3] If minimum hours operated each day are not in compliance with sec. 3.71 of the Rules, attach hereto a statement of explanation.

2

49

7. News	[illegible]	7. News	[illegible]
8.		8.	
9. Total	59.40	9. Total	40.6

2. (a) Are phonograph records used? _____ If so, state average number of hours per month 32.67

(b) Are any other mechanical records (electrical transcriptions, etc.) used? Yes If so, state average number of hours per month 26.33

13.[6] (a) Set forth fully any respects in which the character of the program service proposed is different from that carried on under the existing license as reflected in your answer to section 11. The only changes contemplated in the character of program service involves greater emphasis on programs originating at Georgia School of Technology, utilizing the school's faculty, students and facilities. Applicant intends to devote more time to Georgia Tech programs than formerly. Radio Engineering students of Ga. Tech, properly qualified, will be required to serve as part-time Assistant Operators.
(If none, so state)

(b) Attach copies of all contracts or give the substance of all understandings of a general nature affecting program service, including (1) chain broadcast contracts, (2) transcription service contracts, (3) bulk time sales contracts, and (4) contracts or understandings which confer upon persons other than the licensee (or employees thereof entirely under the direction of the licensee) any power or authority with respect to the selection or production of programs or the sale of time, even though ultimate determination with respect to such matters is retained by the licensee. See "Exhibit 2" attached.

14.[6] Set forth in an exhibit the name, address, citizenship and experience of each employee of the station having any responsibilities in connection with the technical operation or with programs, showing the position and duties of each. See "Exhibit 3" attached.

---

[4] Include in this item fraternal, chamber of commerce, charitable, and other civic but nongovernmental programs.

[5] Include in this item all municipal, state, and federal programs, including political or controversial broadcasts by public officials, or candidates for public office, and regardless of whether or not the programs included under this item are entertainment, educational, agricultural, etc., in character.

[6] Any document already on file with the Commission may be incorporated as part of this application by reference if accompanied by a statement that there has been no change therein since the date of filing, and provided that the reference is sufficiently complete by date of filing, file number and application in connection with which filed, to permit identification.

Dated this 20 day of May, 1943

(Must correspond with Item 1) Applicant.
HE GEORGIA SCHOOL OF TECHNC [illegible]
By M. L. Brittain
President
Official.

(Be sure all necessary information is furnished and all questions are fully answered. If any portions of the application are not applicable, specifically so state, and show reasons therefo Defective applications may be returned without consideration.—section 1.72, Rules of Practice and Procedure.)

STATE OF Georgia
COUNTY OF Fulton } ss:

M. L. Brittain, being first duly (sworn upon his oath, (affirmed according to law deposes and says that he is the President
(If applicant is not an individual, state relation of affiant to applicant)
above-named applicant, and that the facts stated in the foregoing application, and all exhibits attached thereto, are true of his own knowledge, except as to such statements as are therein stated on information and belief, and as to such statements he believes them to be true.

M. L. Brittain.
Affiant

Subscribed and sworn to before me this 20 day of May, 1943

Harriet Henderson
Notary public

(SEAL)

(Notary public's seal must be affixed where law of jurisdiction requires, otherwise state that law does not require seal.)

My commission expires _____, 19__.

Notary Public, Fulton County, Georgia.
My Commission Expires Feb. 11, 1945

9 Must be subscribed and verified by party applicant, by one of the parties if more than one, by an officer if applicant is a corporation, or by attorney of applicant only under the provisions of section 1.121 which must be fully explained.

PETITION FOR GRANT OF APPLICATIONS WITHOUT A HEARING

Comes now the Georgia School of Technology, licensee of broadcast station WGST of Atlanta, Georgia, and the applicant in the above entitled cause, petitioning the Commission as follows:

To set aside its action of October 12, 1943, designating the above described applications for hearing, and to grant said applications without hearing.

In support of the foregoing, petitioner states as follows:

A. Preliminary Statement

1. Your Commission on May 8, 1943 passed an order denying said applications "without prejudice to the filing of a further application for renewal of license in accordance with the conclusions reached in these proceedings, such further application . . . . to set forth the plan of the applicant for the acquisition of the necessary facilities and equipment, and for the business management, representation, and control of its future operations, together with a list of all persons to participate therein."

2. Applicant, availing itself of this privilege, filed its application for renewal on May 22, 1943 and amended same from time to time thereafter in order to apprise the Commission currently with all steps taken to secure full control over the management and direction of radio station WGST.

3. As of October 12, 1943, the date of the Commission's last Order, the record in substance presented the following case:

[fol. 64] (a) Applicant is a state-supported institution of higher learning and a constituent part of the University System of Georgia. All institutions within the University System are under the direction and management of a Board of Regents which by statute is an instrumentality and department of the government of the State of Georgia. The "Regents of the University System of Georgia" is the name of a public corporation authorized to acquire and hold property in trust for the respective institutions subject to the management and direction of said Board. The Board of Regents is also the governing body of this public corporation.

(b) In pursuance of the conclusions of the Federal Communications Commission, the Regents of the University

System of Georgia, in its corporate capacity, undertook to acquire for and on behalf of applicant, Georgia School of Technology, all physical assets belonging to Southern Broadcasting Stations, Inc., necessary for and incidental to the operation of said broadcast station. These negotiations resulted in the consummation of a contract between the then stockholders of Southern Broadcasting Stations, Inc. and said Regents. Copies of the contract are of file with the Commission. The Nine Thousand Eight Hundred and Twenty-Four (9,824) Shares referred to in this contract were delivered to the Regents by the stockholders on or about May 22, 1943. These shares constituted all of the outstanding stock of Southern Broadcasting Stations, Inc. Applicant thus acquired control over radio station WGST.

(c) This control was exercised on June 7, 1943 by the election of a new Board of Directors, representing applicant. The new Board accepted the resignations of all former officers of Southern Broadcasting Stations, Inc. and, in turn, elected its own official personnel. Action was immediately taken by the new Board to liquidate Southern Broadcasting Stations, Inc. and to surrender its charter.

(d) The liquidation was effected by transferring the assets of the corporation to Regents of the University System of Georgia, which accepted the transfer in trust for the exclusive use and benefit of applicant. The physical assets so transferred are set forth and contained in Exhibit "A" of the contract effective April 15, 1943. The remain-[fol. 65] ing assets which were transferred consisted of specific items mentioned in the transfer itself (a copy of which is of record) as well as cash and receivables accruing from the operation of the station since April 14, 1943. The financial condition of the corporation as of April 15 appears of the record. No debt of Southern Broadcasting Stations. Inc. which accrued prior to April 15, 1943, was assumed by applicant.

(e) The Superior Court of Fulton County accepted the surrender of the charter of Southern Broadcasting Stations, Inc. on or about July 9, 1943 after a showing satisfactory to the Court, that the corporation's liabilities and assets had been properly disposed of and that the surrender of its charter would be without prejudice to the rights of any stockholder or creditor.

(f) Since July 9, 1943, Applicant has managed, directed and controlled the affairs of radio station WGST through a Committee appointed by its governing board, viz., the said Regents. This Committee consists of Dr. M. L. Brittain, President of Georgia Tech; Dr. S. V. Sanford, Chancellor of the University System of Georgia, and the following Regents: Frank M. Spratlin, alumnus of Georgia Tech, Chairman; Sandy Beaver; William S. Morris; Pope F. Brock and Marion Smith.

(g) The record contains an amendment to the effect that no former officer, director, or stockholder was then employed or would thereafter be employed by applicant. The only persons within this category who at any time had been retained by applicant prior to said amendment were Clarence H. Calhoun and Mrs. Paula J. Wilhite. Applicant terminated Mr. Calhoun's connection June 21, and Mrs. Wilhite's, June 23, 1943.

(h) The contract between the Regents and the former stockholders of Southern Broadcasting Stations, Inc. provides that the latter are to receive in payment for their shares of stock an amount equivalent to fifteen (15) percent of the collections of the station's net billings for a period beginning April 15, 1943 and ending January 6, 1950.

[fol. 66] B. Reasons for Grant of Application Without Hearing

1. All assets received by applicant or by the Regents on its behalf are fully disclosed in the contract effective as of April 15, 1943. Except as provided therein, no agreement or understanding exists, collaterally or otherwise, with respect to any obligation to or consideration in favor of any former officer, director, or stockholder of the former Southern Broadcasting Stations, Inc., personally or officially, directly or through indirection. This statement is made without reservation or equivocation. No hearing or investigation could possibly disclose anything remotely to the contrary.

2. No benefit or right is given to or reserved by any former officer, director, or stockholder of Southern Broadcasting Stations, Inc. under said contract, except the provision for the payment to former stockholders for their shares of stock which they transferred to the regents of

the University System of Georgia, in trust, for the exclusive use and benefit of applicant.

3. No hearing or investigation could disclose any consideration flowing to any former officer, director, stockholder, or employee of Southern Broadcasting Stations, Inc., not covered by said contract. The extent of the payment, over the period specified in the contract, could now be subject merely to speculation and is beyond the possibility of determination.

4. It may be possible to ascertain the value of the equipment and assets which were transferred by Southern Broadcasting Stations, Inc. to the Regents but such an appraisal would have little, if any, meaning because of the difficulty which applicant would have encountered in acquiring said equipment from any other source under wartime conditions.

5. With all deference to the Commission, applicant contends that the Regents, in consummating the contract of April 15 were exercising a discretion beyond the scope of the Commission's inquiry, unless it appear that the obligations assumed by the Regents are so onerous as to embarrass applicant in effectively discharging its obligation as a licensee of the Commission.

6. Paragraph 6 of the contract, effective April 15, 1943, reads as follows:

> "The first party agrees that it will in good faith undertake to have the Georgia School of Technology [fol. 67] operate Station WGST in an efficient and satisfactory manner to the end that said Broadcasting Station may continue to earn and receive as large net billings as may be possible, having in view general business conditions and other factors which enter into and affect the results of such operations."

The Propriety of this covenant, as applicant is informed, has been challenged on the ground that it tends to obligate licensee to operate said station in the interest of former stockholders of Southern Broadcasting Stations, Inc., rather than in the public interest, as required by law. Since the parties never presumed that such a construction would be placed on the contract and since they entertained no intent to that effect, the contract has been amended by strik-

ing this covenant therefrom, the contract in other particulars remaining as appears of record in this case. Copies of the amendment are herewith shown as Exhibit "A" hereof.

7. No hearing could disclose any degree of influence, control or domination, directly or indirectly, which the former officers, stockholders, directors and employees of Southern Broadcasting Stations, Inc., could have on the future operations of WGST.

8. The Board of Regents is by statute the governing body of the Georgia School of Technology. The Commission surely would not indulge the presumption that the Board would in the slightest degree be remiss in its public duty. No hearing or investigation could disclose anything except the most meticulous attention to the affairs of applicant on the part of its Board. The Board has specifically designated the Committee, named above, of which Frank M. Spratlin is Chairman, to manage, control and direct the operations of radio station WGST and its acts in that behalf are in law and in fact the acts of applicant.

9. Applicant calls the Commission's attention to facts which demonstrate:

(a) That the Board of Regents and its Committee have given the utmost diligence to the proper operation of radio station WGST;

(b) That the payment of fifteen (15) percent of collections on net billings to the former stockholders of Southern Broadcasting Stations, Inc., could not possibly embarrass applicant in fulfilling its public responsibilities as licensee of the Commission.

[fol 68] The books of account reflecting the operations of radio station WGST, subsequent to the transfer of the station by Southern Broadcasting Stations, Inc., to the Regents in trust for the applicant, were opened June 14, 1943. Beginning with July 1 a full quarter has elapsed on the basis of which a comparison is possible between the results obtained by the former management and results secured by applicant on its own behalf.

In parallel columns a summary is presented covering operations for the quarter beginning July 1, 1942 as com-

pared with the quarter beginning July 1, 1943. This comparison is made on exactly the same basis—before taxes, State or Federal, income or ad valorem, but after giving effect to the payment of that portion of the deferred purchase price accruing to former stockholders for their respective shares of stock.

	Southern Broadcasting Stations, Inc.		Georgia Tech	
Quarter Ending		Sept. 30, 1942		Sept. 30, 1943
Income:				
Sales		$82,121.21		$97,427.08
Less Commissions, Allowances and Discounts		5,099.08		6,822.71
Net Sales		$77,022.13		$90,604.37
Expenses:				
Administrative & General	$ 7,709.78		$ 5,781.55	
Engineering	9,573.80		9,815.29	
Studio	10,813.59		11,962.51	
Selling	15,274.91		4,244.96	
15% Purchase Money	.....		13,590.61	
		43,372.08		45,394.92
Net Profit		$33,650.05		$45,209.45

This comparison shows an improvement of Eleven Thousand Five Hundred and Fifty-Nine and 40/100 Dollars ($11,559.40).

Taking these earnings as a guide, the net fo. the year ending June 30, 1944 should reach One Hundred Eighty Thousand Eight Hundred and Thirty-Seven Dollars ($180,837.00) before taxes but after giving full effect to the payment of the deferred purchase money accruing during that period. Southern Broadcasting Stations, Inc., in its best year, 1941, before any deduction for taxes, experienced a net operating income which fell short of that figure by Forty-Eight Thousand Dollars ($48,000.00).

[fol. 69] Another factor has entered the situation of which the Commission hitherto has not been informed. The Commissioner of Internal Revenue, under date of August 31, 1943, advised the Regents with respect to "net earnings accruing from the operations of radio station WGST, the title to which stands in the name of the Regents of the University System for the benefit and exclusive use of the Georgia School of Technology; inasmuch as you are a department or instrumentality of the State of Georgia, you

are exempt from federal income tax and are not required to file returns of income." Furthermore, under the laws of Georgia, the assets of radio station WGST are now exempt from property taxes which otherwise would be imposed by the City of Atlanta, County of Fulton, and the State of Georgia. The Commission must of necessity instantly recognize that the burden of meeting the remainder of the purchase money payable to the former stockholders is insignificant in comparison with the tax burdens of which applicant is entirely relieved.

10. The Board of Regents, as the governing body of the Georgia School of Technology, the applicant herein, has with dispatch

(a) acquired control of radio station WGST for the exclusive use and benefit of applicant;

(b) severed all connections between said station and all former officers, directors and stockholders of Southern Broadcasting Stations, Inc.;

(c) placed the management of the station in competent hands and is exercising supervision over the station and its affairs in order that, as licensee of the Commission, it will fully discharge its public responsibilities.

The Board of Regents has every intention of maintaining the station as an effective instrumentality in the field of public broadcasting and is determined that the facilities of WGST will, with the aid of the Commission, be constantly improved. The income of the station is being marshalled to the end that its programs and mechanical efficiency will keep abreast of the best traditions and highest ideals of this industry.

No public hearing or investigation could disclose any circumstance inconsistent with or other than as fully supporting the representations herein made.

[fol. 70] 11. Finally, applicant believes that the Commission should accord due weight to the fact that applicant is a public institution, under the direction of a Board, which itself is a department of a sovereign State of this Union and entitled to full faith and credit, especially in the absence of any circumstance to impugn its ability or character. And

applicant respectfully submits that upon the record the Commission, without further hearing, is overwhelmingly justified is holding that the renewal of the pending application is in accord with public interest, convenience and necessity.

Wherefore, the premises considered, petitioner respectfully requests the Commission to set aside its action of October 12, 1943, designating for hearing petitioner's applications and to grant same without further hearing.

Respectfully submitted, Georgia School of Technology. By Louis G. Caldwell, 914 National Press Building, Washington 25, D. C.; Reed T. Rollo, 914 National Press Building, Washington 25, D. C.; John E. McClure, Southern Building, Washington, D. C.

Of Counsel: Philip Weltner, 1209 First National Bank Building, Atlanta, Ga.; T. Grady Head, Attorney General for the State of Georgia.

[fol. 71] EXHIBIT "G" TO ANSWER

72101

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington 25, D. C.

File No. B3-R-441

Docket No. 6534

In Re Application of GEORGIA SCHOOL OF TECHNOLOGY (WGST), ATLANTA, GEORGIA, for Renewal of License

ORDER

At a session of the Federal Communications Commission held in its offices in Washington, D. C., on the 23rd day of November, 1943;

The Commission having under consideration a petition requesting a grant without hearing of the application for the

renewal of license of Georgia School of Technology (WGST), Atlanta, Georgia, File No. B3-R-441, Docket No. 6534;

It is ordered, This 23rd day of November, 1943, that the aforementioned petition to reconsider and grant without hearing of the petitioner's application for renewal of license be, and it is hereby, denied.

Federal Communications Commission, T. J. Slowie, Secretary.

[fol. 72] EXHIBIT "H" TO ANSWER

85035

Before the Federal Communications Commission, Washington, D. C.

B-221

Docket No. 6534

File No. B3-R-411

In re Application of GEORGIA SCHOOL OF TECHNOLOGY (WGST), ATLANTA, GEORGIA, for Renewal of License

APPEARANCES:

Louis G. Caldwell, Reed T. Rollo, John E. McClure, and Phillip Weltner on behalf of applicant; Marcus Cohn on behalf of the Commission.

PROPOSED DECISION

Preliminary Statement

1. This is a proceeding upon an application filed May 22, 1943, by the Georgia School of Technology for renewal of license for the operation of broadcast station WGST, Atlanta, Georgia.

2. A prior application by the Georgia School of Technology for renewal of license for station WGST was denied by the Commission on May 8, 1943 following the proceedings in Docket 5903. Such denial was based upon findings and conclusions by the Commission that by virtue of an agreement in effect at the time of such proceedings, control of

station WGST had been illegally transferred to Southern Broadcasting Stations, Inc., and the Georgia School of Technology had failed to assume the responsibilities and discharge the duties of a licensee of a broadcast station as required by the Communications Act of 1934, as amended, and the Commission's Rules and Regulations.* However, the Commission further concluded that the licensee's failure to comply with the Act and the Commission's Rules had been due in some measure to misunderstanding and lack of knowledge rather than to bad faith. The Commission stated that it would consider the issuance of a renewal of license to the Georgia School of Technology provided assurances were given that applicant was prepared to and would in fact assume and discharge the full responsibilities of a licensee. [fol. 73] Accordingly, the Georgia School of Technology was given the opportunity of filing within 60 days a further application for renewal of license in accordance with the Commission's conclusions, setting forth the plan of the School for the acquisition of the necessary facilities and equipment, and for the business management, representation, and control of the future operations of WGST, together with a list of all persons to participate therein. Pending determination of the instant proceedings, operation of WGST has continued under temporary extensions of license to the Georgia School of Technology.

3. The instant application was filed on May 22, 1943 pursuant to the opportunity afforded in the Commission's decision in Docket 5903. On October 12, 1943, the Commission designated the application, as amended, for hearing upon the following issues:

> a. To determine whether the terms, provisions and conditions of the Commission's Proposed Findings of Fact and Conclusions of March 23, 1943, and Order of May 8, 1943, in Docket 5903 are effectuated by the provisions and consummation of the contract entered into between The Regents of the University System of

---

* The details of such agreement and the operations thereunder are set forth in the Commission's Findings of Fact and Conclusions of Law in Docket 5903 (10 F.C.C. —) which are incorporated herein by reference. This agreement (hereinafter referred to as the 1936 agreement) was to run until January 6, 1950.

Georgia, on behalf of the licensee, Georgia School of Technology, and the Southern Broadcasting Stations, Inc. of April 15, 1943.

b. To determine the extent to which the former officers, directors, stockholders and employees of Southern Broadcasting Stations, Inc., will participate in the revenues of the station under the contract of April 15, 1943, as heretofore described, and the effect which this participation will have on the over-all finances and operation of the station.

c. To determine the consideration given by the former officers, directors, stockholders and employees of Southern Broadcasting Stations, Inc., in return for the share in the earnings of the station which they will receive under the contract of April 15, 1943, as heretofore described.

d. To determine the value of the equipment owned by, and the assets of, the Southern Broadcasting Stations, Inc. at the time the contract of April 15, 1943, heretofore referred to, was consummated.

e. To determine the degree of influence, control and domination, whether direct or indirect, that the former officers, stockholders, directors and employees of the Southern Broadcasting Stations, Inc. will have on the future operations of WGST.

f. To determine the amount and degree of participation, control and influence The Regents of the University System of Georgia's WGST Radio Committee, and each of its members, will exercise in the operation of the station.

[fol. 74] g. To determine whether there are any other written or oral contracts, understandings or agreements between the former stockholders, officers, directors or employees of the Southern Broadcasting Stations, Inc. and The Regents of the University System of Georgia, the WGST Radio Committee, or any of their members, in connection with the operation of WGST, or the contract of April 15, 1943, heretofore referred to, which have not been disclosed to the Commission.

h. To determine whether in the light of the Commission's Proposed Findings of Fact and Conclusions and

Order in Docket 5903 and the present and future relationship between The Regents of the University System of Georgia, the WGST Radio Committee, the licensee, Georgia School of Technology, and the Southern Broadcasting Stations, Inc., their present and past officers, directors, stockholders and employees, the granting of this application and the continued operations of WGST will serve public interest, convenience and necessity.

Findings of Fact

4. The applicant is the Georgia School of Technology, a unit of the University System of the State of Georgia, governed by The Regents of the University System of Georgia. The Board of Regents is made up of 16 members, 15 of whom are appointed by the Governor of Georgia subject to confirmation by the State Senate. The Governor is the 16th Regent. Fourteen of the Regents are appointed for terms of 6 years, arranged so that they do not run concurrently. The remaining appointee serves at the will of the Governor.

5. In 1943 the Board of Regents appointed a committee, designated The WGST Committee, to manage, direct and control the affairs of the radio station. The committee consists of: Regents Frank M. Spratlin (Chairman), Sandy Beaver, William S. Morris, Pope F. Brock, Marion Smith, M. L. Brittain and S. V. Sanford. Under agreement with the stockholders of Southern Broadcasting Stations, Inc. entered into on April 15, 1943, and later amended, the Regents of the University System of Georgia, acting through the WGST Committee, acquired all of the stock of Southern Broadcasting Stations, Inc., and liquidated said corporation. It appears that, by these arrangements, the influence and control of the former stockholders, officers, directors, and employees of Southern Broadcasting Stations, Inc., has been removed from the operations of WGST. However, the purchase of the stock of Southern Broadcasting Stations, Inc. sets forth the consideration of 15% of WGST's net billings (the station's gross income) from the sale of time for any and all types of broadcasting, visual or sound, including any and all revenues which may be derived from such sources as a result of any new developments in the broadcasting field during the period in which payments are to be made. Payments under the contract are to be made

for the period from April 15, 1943 to January 6, 1950, the latter date being the same date as the termination date of the 1936 agreement.

[fol. 75] 6. Calculated upon the net billings of WGST for 1942, the applicant would pay to Southern Broadcasting Stations, Inc.'s stockholders, under the contract of April 15, 1943, approximately $333,000 for their stock. On the basis of WGST's operations for July, August and September of 1943, the payments to the former stockholders will total approximately $366,000. In 1942 15% of the station's net billings would have been approximately $50,000 and the station's total net income before taxes was only $71,293. Thus, on this basis the former stockholders of Southern Broadcasting Stations, Inc. would in 1942 have received payments exceeding 70% of the station's net income before taxes for that year. These payments are allegedly for the purchase of stock in a corporation the net worth of which had not been determined, Southern Broadcasting Stations, Inc.'s only assets at the time of the purchase of the stock being its contracts and the equipment of WGST, ownership of which has been questioned. Such contracts were based upon the corporation's former relationship with WGST under the 1936 agreement and do not appear to have any real asset value in the absence of such a relationship. The value of the equipment is estimated to be $50,000.

7. A member of the WGST Committee of the Board of Regents testified that the value of the assets of Southern Broadcasting Stations, Inc. was not taken into consideration in arriving at the amount to be paid for the stock of the corporation. He testified that the members of the Committee active in the negotiations wanted to be liberal with the stock vendors and retain their good will so that the former stockholders would cooperate in maintaining WGST's past associations and would not transfer their interests, such as the network contract, to other stations. Accordingly, after "horsetrading", the 15% figure of net billings was reached. Further testimony clearly indicated that no effort was made to get equipment elsewhere nor was any effort made to ascertain whether the former stockholders could carry over their network contract after being divorced from the operations of WGST. In addition, there is testimony indicating that the WGST Committee operated

on the basis that they desired to reward the former stockholders for the commercial success they made of operating the station.

Conclusions

1. Although the influence and control of the interests identified with Southern Broadcasting Stations, Inc. appear to have been removed from the operations of Station WGST, the arrangements entered into under the agreement of April 15, 1943, must be considered in the light of the effect of such arrangements upon the station's ability to operate in the public interest. The Communications Act of 1934, as amended (Sections 308(b) and 307(d)), requires that consideration be given to the financial qualifications of applicants for licenses or renewal of licenses. The fact that this station is licensed to a State educational institution does not relieve the Commission of the responsibility of examining the financial qualifications of the applicant. WGST is not a non-commercial educational station but is operated by the school as a commercial enterprise. If the basis upon which the station is proposed to be operated is unsound from a financial standpoint, we cannot assume that the State will supply the deficiencies from public funds and no attempt was made to establish in the record that the State would meet any operating deficits.

[fol. 76] 2. The obligation imposed upon the station, under this agreement, of paying 15% of its gross income for a period of more than 7 years raises grave doubts that future operation of the station in the public interest is possible. Although from the station's income it would appear that the new arrangement lessens the station's operating costs because of the removal of the tax burden (with the operation of the station by a unit of the State of Georgia), the fact that the payment is from gross income would present serious problems were the station's commercial position to retrogress. Under this arrangement the station's gross income would need to be, for the next several years, at a high ratio to its net income, if the station's operations are to be conducted on a financially sound basis. Under ordinary circumstances the reduction of a station's gross income by 15%, with its operating costs remaining constant, could result in the station suffering an operating loss rather than a net profit.

3. The ability of the station to shoulder this burden successfully and in a manner assuring that its service to the public will not suffer unduly is further rendered doubtful by the fact that the payments would be made to the former stockholders of Southern Broadcasting Stations, Inc. in return for considerations which are at best of questionable value to the station. As was pointed out above, the net worth of the corporation whose stock the applicant is purchasing has not been determined. The assets of this corporation consists of contracts entered into by the corporation on the basis of former relationships with the station which the Commission found, in Docket 5903, to be in contravention of law. Without such a relationship, these contracts would appear to be valueless. Moreover, even the ownership of the station equipment, whose estimated value is far less than the amount of payments which the station may be required to make, is in question.

4. In view of the foregoing, the Commission concludes that the arrangements under the contract of April 15, 1943, would jeopardize the licensee's financial ability to conduct the future operation of the station in the public interest and that, therefore, public interest, convenience or necessity would not be served by a grant of the instant application.

5. There are additional reasons why under the arrangements made in the contract of April 15, 1943, public interest, convenience or necessity would not be served by a grant of this application. The assumption by the applicant of a burden amounting to 15% of its gross income resulting not only from the operations of Station WGST but from all new broadcasting developments, including FM and television, would have the effect of restraining the licensee from entering the field of FM and television broadcasting. Such a restraint does not appear to be in the public interest.

6. Moreover, it seems clear that the payments of 15% of the gross income represent an effort on the part of the parties to give further effect to the agreement by which control of Station WGST had been illegally transferred to Southern Broadcasting Stations, Inc. As pointed out, these payments are to continue to January 6, 1950, the date when the 1936 agreement would have expired if that contract had not been terminated. Southern Broadcasting Stations, Inc. asserts ownership to the equipment of WGST, which has

[fol. 77] an estimated value of $50,000, but its title has been questioned. Aside from that, it does not now have and never has had any legal interest in the operation of the station. Accordingly, the payments provided for in the contract of April 15, 1943, and estimated on the basis of the station's present operations to total over $300,000 represent a payment to Southern Broadcasting Stations, Inc. far in excess of that Corporation's legal interest, if any, in WGST. A grant of the renewal application under circumstances where a party to an arrangement found by the Commission to be in contravention of law would continue to profit from such arrangement would not be in the public interest since it would, in effect, condone such illegality and thwart the Commission's efforts to enforce the requirements of the Act.

7. Therefore, the Commission concludes that a granting of this application of the Georgia School of Technology for renewal of the license of radio station WGST would not serve the public interest, convenience or necessity. The application, therefore, should be denied, without prejudice, however, to the submission within ninety days by the Georgia School of Technology of a new application for a construction permit and license to operate on the same frequency, provided it is affirmatively shown that no further effect is given to the agreements between the Georgia School of Technology and Southern Broadcasting Stations, Inc., which the Commission has found in Docket 5903 and in this proceeding to be contrary to the Communications Act and incompatible with the operation of the station in the public interest.

Federal Communications Commission, T. J. Slowie, Secretary.

C. W. W. H. S. D.

Adopted September 19, 1945.

Released Sep. 20, 1945. See Section 1.231 of the Commission's Rules of Practice and Procedure.

Signed by Above. Mailed by Mail & Files, Sep. 20, 1945. W. W.

[fol. 78] EXHIBIT "I" TO ANSWER

This is to certify that the following is a true, correct, and compared excerpt from the minutes of the meeting of the Board of Regents, held October 11, 1945:

"Resolved, by the Board of Regents of the University System of Georgia that the ruling of the Federal Communications Commission having made the contract with the stockholders of Southern Broadcasting Stations, Inc. legally impossible of performance, the board hereby approves the action of its WGST Radio Committee in directing that said contract be not further complied with. This action is taken without prejudice to a fair adjustment or settlement of whatever rights the said stockholders may have, subject to the approval or consent of the Federal Communications Commission."

This the 28th day of November, 1945.

(S.) L. R. Siebert, Secretary, Board of Regents of the University System of Georgia.

[fol. 79] EXHIBIT "J" TO ANSWER

Docket File Copy. Original.

86076

6534-18

Before the Federal Communications Commission, Washington 25, D. C.

B-221

Docket No. 6534

File No. B3-R-411

In the Matter of the Application of GEORGIA SCHOOL OF TECHNOLOGY (WGST), ATLANTA, GEORGIA, for Renewal of License

ORDER

The Commission having under consideration the application (File No. B3-R-411) of Georgia School of Technology (WGST), Atlanta, Georgia, for renewal of license; and

It appearing that a Proposed Decision of the Commission was adopted on September 19, 1945 with respect to such application, and that no party to the proceedings has filed exceptions thereto or has filed oral arguments thereon;

It is hereby ordered, this 9th day of November, 1945, that the Proposed Decision heretofore adopted Be, and Is Hereby, Made a Part Hereof by Reference and Adopted as the Findings of Fact and Conclusions of the Commission: and

It is further ordered, upon consideration of the entire record that the application of Georgia School of Technology for renewal of the license of Station WGST, Be and It Is Hereby, Denied without prejudice, however, to the submission before December 18, 1945, by the Georgia School of Technology, of a new application for a construction permit and license to operate on the same frequency, pro-
[fol. 80] vided it is affirmatively shown that no further effect is given to the agreements between the Georgia School of Technology and Southern Broadcasting Stations, Inc., which the Commission has found in Docket 5903 and in this proceeding to be contrary to the Communications Act and incompatible with the operation of the station in the public interest.

It is further ordered, that Georgia School of Technology, Be, and Is Hereby, Granted a temporary license to operate Station WGST for a period ending December 18, 1945.

Federal Communications Commission.

CWW

I hereby certify that the foregoing is a correct copy of the Order of the Federal Communications Commission in Docket No. 6534.

T. J. Slowie, Secretary.

By H. S. Davis.

Signed by above. Mailed by R. Mail & Files, Nov. 15, 1945.

EXHIBIT "K" TO ANSWER

(P.74)

Form 302
(March 6, 1945)

Form Approved
Budget Bureau No. 52-R015.2

12-4-45

File No. B3-L-1917

Call letters .... WGST

UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
DEC 4 1945
OFFICE OF SECRETARY

APPLICATION FOR STANDARD BROADCAST STATION LICENSE

(Submit in triplicate to Federal Communications Commission, Washington, D.C. Swear to two copies)

(Give current information; do not copy engineering data from previously filed applications)

To the Federal Communications Commission:

1. Name of applicant[1] Regents of the University System of Georgia, for and on behalf of Georgia School of Technology.

2. Post-office address: State Georgia City Atlanta

Street and number 90 Forsyth Building, N. W.

3. Construction permit under which construction has been made: Application for Construction Permit filed simultaneously herewith pursuant to Commission order in Docket 6534, dated November 9, 1945.
File No. ..... Date ....., 19 .....

4. Construction of station was commenced ---- and was completed ----, and is now in satisfactory operating condition and ready for regular operation. Station in operation under temporary license.

5. Description of transmitting apparatus which has been constructed pursuant to said construction permit: *(Operating constants requested below shall be those observed after proper adjustment of the apparatus during equipment tests.)*

(a) Make RCA Manufacturing Co. Type No. SC Serial No. SC 1546

(b) Oscillator: Type of circuit Crystal Number, manufacturer's name, and type of tubes 1 RCA 843

Actual plate current per tube .010 amp Plate voltage 250 volts

(c) Last radio stage: Number, manufacturer's name, type of tubes and class of operation[2]

(P.75)

(d) Modulator or last audio stage: Number, manufacturer's name, type of tubes and class of operation 4 - RCA - 845 Class "A Prime"

Actual plate current per tube unmodulated .060 amp

Tone modulated 400 cycles 85% .060 amp Plate voltage 1200

(e) What maximum percentage of modulation was obtained on equipment tests under authorized operating conditions? 100%

(f) State name and type number of modulation monitor General Radio Type 731 A

(g) Give Federal Communications Commission approval number 1551

(h) Specify manufacturer's name, type number, and full scale reading of the following meters:
(1) In last radio stage:

Plate voltmeter Westinghouse Type DX 15000volts

Plate ammeter Westinghouse Type DX 2.5 amps

(2) Antenna ammeter Weston Model 640 12.5 amps

(i) Antenna current for authorized operation: *(If multielement antenna, give current for each element and current at point of resistance measurement.)*

Night 4.73 amperes.

Day 10.6 amperes.

(j) Maximum operating carrier power output of transmitter for satisfactory operation is 5000 watts.

(k) Maximum rated carrier power of transmitter as determined by orders of the Commission is 5000 watts.

(l) Is inverse feedback utilized? Yes If so, to what value of feedback power is transmitter adjusted? 11 d.b.

(m) What is manufacturer's recommended operating efficiency for the last radio frequency amplifier

(P.76)

5) (Description of frequency monitor.

(1) Manufacturer's name ...RCA..... Type No. ...311 AB...

(2) Serial No. ...624..... F.C.C. Approval No. ...1462...

(3) Date of original installation ...1940.....

(4) Date of last reinstatement into service ...Not out of service.....

(5) Give the following data on the calibration of the monitor during the testing of the above equipment Last frequency check:

Date	Time	Name of external checking agency	Frequency measured by external agency	Monitor reading, high or low
Nov. 2, 1945	3:00 p.m.	Van Nostrand Engineering Service	- 1 cycle	- 1.5 cycles

(p) By what method and how often will regular checks of the calibration of the frequency monitor be repeated? ...Frequency is checked twice a month by Van Nostrand Engineering Service.....

.....

6. Location of transmitter: State .....Georgia..... County .....Fulton.....
City or town ....near Atlanta..... Street and number 101 Chamblee Bridge Rd., N.E.
N. Latitude: Degrees ....33..... Minutes .....48..... Seconds ....38....
W. Longitude: Degrees ..84..... Minutes .....21..... Seconds ....24....

7. Location of studio: State .....Georgia..... County .....Fulton.....
City or town .....Atlanta..... Street and number ....90 Forsyth Street.....

8. The frequency, power, hours of operation, and call letters authorized, are as follows:
(a) Frequency .....920..... kilocycles.
(b) Power: (1) Night ...1000.....
(2) Day .....5000.....
(c) Hours of operation ....Unlimited.....
(d) Call letters ..WGST.....

(p.77)

10. Give actual costs of making installation for which construction was authorized:

...ion already operation ...der temporary ...icense.

(a) Transmitter proper, including tubes $ ----------

(b) Antenna system, including antenna, ground system, coupling equipment, and transmission line $ ----------

(c) Frequency and modulation monitors $ ----------

(d) Studio technical equipment, microphones, transcription equipment, etc. $ ----------

(e) Acquiring land $ ---------- ------

(f) Acquiring or constructing buildings $ ----------

(g) Other items, state nature $ ----------

(h) Total $ ----------

11. Attach a detailed balance sheet, as at the completion date of the authorized construction, showing applicant's financial position. See Exhibit C attached to application for construction permit, filed simultaneously herewith.

12. State changes, if any, in capitalization, and report any contracts affecting ownership not heretofore shown in the application for construction permit. ----------

None

(if none, so state)

13. (a) Has applicant any contract, arrangement, or understanding, express or implied, with a network organization for the broadcasting of chain programs? Yes

(b) Does applicant, in the event this application is granted, propose to broadcast network programs? Yes

(c) If network programs are to be broadcast, state arrangements under which they are to be obtained and attach copies of any contractual arrangement which may have been made. If the arrangement is based on an oral understanding, a written statement of the arrangement should be submitted. Any contract or written statement of arrangement, if already on file, may be incorporated by reference if accompanied by a statement that there has been no change therein since filing date, and provided reference is sufficiently o[illegible]ete by date of filing, file number, and application or other document in connection wit[illegible] which filed to permit identification

See Exhibit H attached to application for construction permit, filed simultaneously herewith.

14. Apart from the apparatus constructed, have all the terms, conditions, and obligations set forth

Mary Franken
Notary Public.

/SEAL/

(Notary Public's seal must be affixed where law of jurisdiction requires, otherwise state that law does not require seal.)

My commission expires April 30, 1949

CITY OF [redacted] Washington)
DISTRICT OF) ss.
[redacted] Columbia)

Ben Akerman, being first duly sworn, deposes and says that he is the technical director or chief engineer for Regents of the University System of Georgia, for and on behalf of Georgia School of Technology permittee or licensee of Radio Station WGST; that he examined the engineering information in the within and foregoing application and knows the contents thereof and that the matters and things therein stated are true of his own knowledge.

Ben Akerman
Technical Director or Chief Engineer

Subscribed and sworn to before [redacted] 3rd day of December 1945

Mary Franken
Notary Public

/SEAL/

My commission expires April 30, 1949

*/Must be subscribed and verified by party applicant, by one of the parties if more than one, by an officer if applicant is a corporation, or by attorney of applicant only under the provisions of rule 1.121 which must be fully explained.

(3)

FEDERAL COMMUNICATIONS COMMISSION
DEC 4 1945
OFFICE OF SECRETARY

4-3

(P 78)

ted this ..3rd... day of .December.. 19.45.

Regents of the University System of Georgia
for and on behalf of Georgia School of Technology
(Must correspond with item 1) Applicant.

By .....

Frank N. Spraddin, Chairman, Radio Committee
Regents of the University System of Georgia

(BE SURE ALL NECESSARY INFORMATION IS FURNISHED)

Subscribed and sworn to before me this 3rd day of December 19 45

.....
Notary Public.

/SEAL/

(Notary Public's seal must be affixed where law of jurisdiction requires, otherwise state that law does not require seal.)

My commission expires April 30, 1949

CITY OF [redacted] Washington)
DISTRICT OF [redacted]) ss.
[redacted] Columbia)

Ben Akerman, being first duly sworn, deposes and says that he is the technical director or chief engineer for Regents of the University System of Georgia, for and on behalf of Georgia School of Technology permittee or licensee of Radio Station WGST; that he examined the engineering information in the within and foregoing application and knows the contents thereof and that the matters and things therein stated are true of his own knowledge.

.....
Technical Director or Chief Engineer

Subscribed and sworn to before me [redacted] 3rd day of December 19 45

.....
Notary Public

/SEAL/

My commission expires April 30, 1949

[fol. 86] EXHIBIT "L" TO ANSWER

Insert No. 5,

In reply to Item 17 (a), page 27: P-4287

This application for construction permit, together with application for license being filed simultaneously herewith, is submitted in compliance with the Commission's Order, adopted November 9, 1945, in Docket No. 6534.

Docket No. 6534 involved the application of Georgia School of Technology for renewal of license of Station WGST, and in that proceeding the Commission denied the application "without prejudice, however, to the submission before December 18, 1945, by the Georgia School of Technology, of a new application for a construction permit and license to operate on the same frequency, provided it is affirmatively shown that no further effect is given to the agreements between the Georgia School of Technology and Southern Broadcasting Stations, Inc., which the Commission has found in Docket 5903 and in this proceeding to be contrary to the Communications Act and incompatible with the operation of the station in the public interest."

The agreements referred to in the above-quoted portion of the Commission's order are:

(1) Agreement dated June 18, 1936, between Regents of the University System of Georgia and Georgia School of Technology, as first parties, and Southern Broadcasting Stations, Inc., as a second party, providing for operation of Station WGST by Southern Broadcasting Stations, Inc.; and

(2) Agreement effective April 15, 1943, between The Regents of the University System of Georgia and the Stockholders of Southern Broadcasting Stations, Inc. pro-
[fol. 87] viding for the acquisition of all of the capital stock of Southern Broadcasting Stations, Inc. by the Regents.

The agreement dated June 18, 1936, was nullified by acquisition by the Regents of all of the stock of Southern Broadcasting Stations, Inc. and the subsequent dissolution of the corporation. The corporation was dissolved by order of the Superior Court of Fulton County, Georgia, dated July 17, 1943.

The agreement effective April 15, 1943, was cancelled by the Regents of the University System of Georgia by resolution adopted at a meeting of the Board of Regents held on October 11, 1945. A true and correct copy of the resolution is hereto attached as Exhibit J. The other parties to the agreement have been notified orally of the cancellation of the agreement and no payments under the agreement have been made since the issuance of the proposed decision of the Commission in Docket No. 6534 on September 20, 1945. The Board of Regents will not undertake to negotiate any adjustment or settlement with the other parties to the agreement unless and until said parties first obtain the approval or consent of the Federal Communications Commission to negotiate a settlement of whatever rights said parties may have under the agreement.

To the Federal Communications Commission:

1. Name of applicant[1] Regents of the University System of Georgia, for and on behalf of Georgia School of Technology.

2. Post-office address: State Georgia City Atlanta

Street and number 90 Forsyth Building, N. W.

3. Construction permit under which construction has been made: Application for Construction Permit filed simultaneously herewith pursuant to Commission order in Docket 6534, dated November 9, 1945.
File No. ..... Date ....., 19 .....

4. Construction of station was commenced ---- and

was completed ----, and is now in satisfactory operating

condition and ready for regular operation. Station in operation under temporary license.

5. Description of transmitting apparatus which has been constructed pursuant to said construction permit: *(Operating constants requested below shall be those observed after proper adjustment of the apparatus during equipment tests.)*

(a) Make RCA Manufacturing Co. Type No. 5C Serial No. BC 1546

(b) Oscillator: Type of circuit Crystal Number, manufacturer's name, and

type of tubes 1 RCA 843

Actual plate current per tube .010 amp Plate voltage 250 volts

(c) Last radio stage: Number, manufacturer's name, type of tubes and class of operation[2]

2 - RCA - 822

Actual night operation: Plate current per tube .350 Plate voltage 7200 If greater day power than night power is authorized, specify the following: Actual day operation: Plate current per tube .75 Plate voltage 13800 Describe fully the method and procedure of reducing power at sunset Excitation and plate voltage are reduced on final stage. Plate voltage is reduced on modulated stage.

[1] Name must be identical with that used in construction permit.

[2] Class "a" plate modulated; Class "b" linear amplifier; high efficiency linear amplifier; grid bias modulation; high efficiency grid modulation, etc.

RECEIVED DEC 5 1945

(g) Give Federal Communications Commission approval number 1551 .....

(h) Specify manufacturer's name, type number, and full scale reading of the following meters:

(1) In last radio stage:

Plate voltmeter Westinghouse Type XX 1500 volts .....

Plate ammeter Westinghouse Type XX 2.5 amps .....

(2) Antenna ammeter Weston Model 640 12.5 amps .....

(i) Antenna current for authorized operation: *(If multielement antenna, give current for each element and current at point of resistance measurement.)*

Night 4.73 ..... amperes.

Day 10.6 ..... amperes.

(j) Maximum operating carrier power output of transmitter for satisfactory operation is 5000 watts.

(k) Maximum rated carrier power of transmitter as determined by orders of the Commission is 5000 ..... watts.

(l) Is inverse feedback utilized? Yes ..... if so, to what value of feedback power is transmitter adjusted? ..... 18 ..... d.b.

(m) What is manufacturer's recommended operating efficiency for the last radio frequency amplifier stage? 25% ..... %

(n) What is the efficiency of the last radio frequency amplifier stage as now adjusted?

24.2% ..... % $\left(\frac{I_a^2 \times R_a}{E_p \times I_p} \times 100\right)$

(2)

42

75

(p) By what method and how often will regular checks of the calibration of the frequency monitor be repreated? Frequency is checked twice a month by Van Nostrand Engineering Service.

6. Location of transmitter: State Georgia County Fulton
City or town near Atlanta Street and number 101 Chesbira Bridge Rd., N.E.
N. Latitude: Degrees 33 Minutes 48 Seconds 38
W. Longitude: Degrees 84 Minutes 21 Seconds 24

7. Location of studio: State Georgia County Fulton
City or town Atlanta Street and number 90 Forsyth Street

8. The frequency, power, hours of operation, and call letters authorized, are as follows:
(a) Frequency 920 kilocycles.
(b) Power: (1) Night 1000
(2) Day 5000
(c) Hours of operation Unlimited
(d) Call letters WGST

9. In what respect, if any, does the apparatus constructed differ from that described in the application for construction permit or in the permit? None

of the international orange bands shall be from 30 to 40 feet. The white bands shall be approximately one-half of the width of the international orange bands.

Each tower shall be cleaned or repainted as often as necessary to maintain good visibility.

For night marking there shall be installed at the top of each tower at least two 100-watt lamps (A–21 clear, Traffic-Signal type) enclosed in aviation red Fresnel or prismatic (heat resisting preferred) obstruction light globes. If only one lamp is operated, the circuit shall be equipped with a relay for instant automatic switchover to the other lamp in case of lamp failure.

On levels at approximately two-thirds and one-third of the over-all height of each tower, there shall be installed at least two 100-watt lamps (A–21 clear, Traffic-Signal type) enclosed in aviation red Fresnel or prismatic (heat resisting preferred) obstruction light globes. Each light shall be mounted so as to insure unobstructed visibility of at least one light on each level from aircraft at any angle of approach.

All lighting shall be exhibited from sunset to sunrise.

At least 25 percent spare lamps shall be provided for immediate replacement purposes.

It is to be expressly understood that the issuance of the foregoing specifications is in no way to be considered as precluding additional or modified marking or lighting as may hereafter be required under the provisions of Section 303(q) of the Communications Act of 1934, as amended.

---

*THIS SPECIFICATION IS A PART OF AND SHALL BE ATTACHED TO THE CURRENT INSTRUMENT OF AUTHORIZATION.

U. S. GOVERNMENT PRINTING OFFICE 204190

40

Filed in office, this the 15 day of Aug. 1947

Harry Magb[illegible]
Deputy Clerk.

91

84

11. Attach a detailed balance sheet, as at the completion date of the authorized construction, showing applicant's financial position. See Exhibit C attached to application for construction permit, filed simultaneously herewith.

12. State changes, if any, in capitalization, and report any contracts affecting ownership not heretofore shown in the application for construction permit. .....

None

(if none, so state)

.....

.....

13. *(a)* Has applicant any contract, arrangement, or understanding, express or implied, with a network organization for the broadcasting of chain programs? ...Yes.....

.....

(b) Does applicant, in the event this application is granted, propose to broadcast network programs? .....Yes.....

(c) If network programs are to be broadcast, state arrangements under which they are to be obtained and attach copies of any contractual arrangement which may have been made. If the arrangement is based on an oral understanding, a written statement of the arrangement should be submitted. Any contract or written statement of arrangement, if already on file, may be incorporated by reference if accompanied by a statement that there has been no change therein since filing date, and provided reference is sufficiently complete by date of filing, file number, and application or other document in connection with which filed to permit identification .....

See Exhibit E attached to application for construction permit, filed simultaneously herewith.

.....

.....

.....

14. Apart from the apparatus constructed, have all the terms, conditions, and obligations set forth in the above-described application for construction permit or permit been fully met? .....
If not, state exceptions .....

No exceptions.

.....

15. Applicant waives any claim to the use of any particular frequency or of the other as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests a station license in accordance with this application.

F.C.C. Form No. 353

EXHIBIT "17" TO ANSWER

B3-L-1917

File No. B3-L-1918 - B3-Z-1744

Official No. 411

Call letters W G S T

UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

RADIO BROADCASTING STATION LICENSE

Subject to the provisions of the Communications Act of 1934, subsequent acts, and treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to conditions set forth in this license, the LICENSEE REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA FOR AND ON BEHALF OF GEORGIA SCHOOL OF TECHNOLOGY is hereby authorized to use and operate the radio transmitting apparatus hereinafter described for the purpose of broadcasting for the term beginning March 7, 1945, and ending May 1, 1947 (3 a. m., Eastern Standard Time)

The licensee shall use and operate said apparatus only in accordance with the following terms:

1. On a frequency of 920 kc.
2. With power of 1 kilo watts, with an additional 4 kilo watts from local sunrise to local sunset only. **
   Antenna current 4.59 amperes for 1 kilo watts; 10.26 amperes for 5 kilo watts.
   Antenna resistance 47.5 ohms.
3. During the following period or periods of time:

Unlimited time

**Average hour of local sunrise: Mar. 5:45 a.m.; Apr. 5:15 a.m.; May 4:30 a.m.; June 4:30 a.m.; July 4:30 a.m.; Aug. 5:00 a.m.; Sept. 5:15 a.m.; Oct. 5:45 a.m.; Nov. 6:15 a.m.; Dec. 6:30 a.m.; Jan. 6:45 a.m.; Feb. 6:30 a.m.; CST

**Average hour of local sunset: Mar. 5:45 p.m.; Apr. 6:15 p.m.; May 6:30 p.m.; June 6:45 p.m.; July 6:45 p.m.; Aug. 6:30 p.m.; Sept. 5:45 p.m.; Oct. 5:00 p.m.; Nov. 4:30 p.m.; Dec. 4:30 p.m.; Jan. 4:45 p.m.; Feb. 5:15 p.m.; CST

4. Under the call letters W G S T
5. With the main studio of the station located at:

90 Forsyth Street
Atlanta, Georgia

The apparatus hereinabove authorized to be used and operated is located at:

Cheshire Bridge Road & Seaboard Railway — Lat. 33° 48' 38.4" North.
Atlanta, Georgia — Long. 84 21 24.0 West.

and is described as follows: R.C.A. MFG. CO., Type 5-C, Broadcasting Transmitter. Direct Crystal Control. Last radio stage: two 2.5 kilowatt vacuum tubes for low level modulation (RCA-892). Maximum rated carrier power output 5 kilowatts. Antenna: 279' (289' overall height), self-supporting, uniform cross section, series-fed, vertical radiator. Ground: 180 - 300' average length copper radials.
Towers painted and lighted in accordance with the attached specifications.

For emergency purposes only, when by reason of breakdown or similar reason the said apparatus cannot be used, the licensee is authorized to use and operate (but only in accordance with the terms and conditions of this license) the auxiliary radio transmitting apparatus located at:

Cheshire Bridge Road & Seaboard Railway,
Atlanta, Georgia

with power of: 1 kilowatt

and described as follows: COMPOSITE - Broadcasting Transmitter. Direct Crystal Control. Last radio stage: one 2.5 kilowatt vacuum tube for low level modulation (RCA- 892). Maximum rated carrier power output 2½ kilowatts.

F. C. C. Form No. 715-A
(Spec. No. A 2 a-2)
(Adopted May 24, 1944)

(82)

Date 2-7-46

File No.* [redacted]

Call Letters* WOSU

OBSTRUCTION MARKING
ANTENNA TOWER(S) OR SUPPORTING STRUCTURE(S)

The tower shall be painted throughout its height with alternate bands of international orange and white, terminating with international orange at both top and bottom. The width of the international orange bands shall be from 20 to 40 feet. The white bands shall be approximately one-half of the width of the international orange bands.

The tower shall be cleaned or repainted as often as necessary to maintain good visibility.

For night marking there shall be installed at the top of the tower at least two 100-watt lamps (A-21 clear, Traffic-Signal type) enclosed in aviation red Fresnel or prismatic (heat resisting preferred) obstruction light globes. If only one lamp is operated, the circuit shall be equipped with a relay for instant automatic switchover to the other lamp in case of lamp failure.

On levels at approximately two-thirds and one-third of the over-all height of the tower, there shall be installed at least two 100-watt lamps (A-21 clear, Traffic-Signal type) enclosed in aviation red Fresnel or prismatic (heat resisting preferred) obstruction light globes. Each light shall be mounted so as to insure unobstructed visibility of at least one light on each level from aircraft at any angle of approach.

All lighting shall be exhibited from sunset to sunrise.

At least 25 percent spare lamps shall be provided for immediate replacement purposes.

It is to be expressly understood that the issuance of the foregoing specifications is in no way to be considered as precluding additional or modified marking or lighting as may hereafter be required under the provisions of Section 303(q) of the Communications Act of 1934, as amended.

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*THIS SPECIFICATION IS A PART OF AND SHALL BE ATTACHED TO THE CURRENT INSTRUMENT OF AUTHORIZATION.

EXHIBIT "N" TO ANSWER

F.C.C. Form No. 353

File No. BR-411
Official No. 411
Call letters W G S T

UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

RADIO BROADCASTING STATION LICENSE

Subject to the provisions of the Communications Act of 1934, subsequent acts, and treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to conditions set forth in this license, the LICENSEE ... **REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA FOR AND ON BEHALF OF GEORGIA SCHOOL OF TECHNOLOGY** is hereby authorized to use and operate the radio transmitting apparatus hereinafter described for the purpose of broadcasting for the term beginning **May 1**, 19**47**, and ending **May 1**, 19**50**
(3 a. m., Eastern Standard Time) (3 a. m., Eastern Standard Time)

The licensee shall use and operate said apparatus only in accordance with the following terms:

1. On a frequency of **920** kc.
2. With power of **1 kilo** watts, with an additional **4 kilo** watts from local sunrise to local sunset only. **
   Antenna current **4.58** amperes for **1 kilo** watts; **10.26** amperes for **5 kilo** watts.
   Antenna resistance **47.5** ohms.
3. During the following period or periods of time:
   Unlimited time.

**Average hour of local sunrise: May, 4:30 am; June, 4:30 am; July, 4:30 am; Aug. 5 am; Sep. 5:15 am; Oct. 5:45 am; Nov. 6:15 am; Dec. 6:30 am; Jan. 6:45 am; Feb. 6:30 am; Mar. 5:45 am; Apr. 5:15 am; Central Standard Time.

**Average hour of local sunset: May 6:30 pm; June, 6:45 pm; July, 6:45 pm; Aug. 6:30 pm; Sep. 5:45 pm; Oct. 5pm; Nov. 4:30 pm; Dec. 4:30 pm; Jan. 4:45 pm; Feb. 5:15 pm; Mar. 5:45 pm; Apr. 6:15 pm; Central Standard Time.

4. Under the call letters W G S T
5. With the main studio of the station located at:
   90 Forsyth Street,
   Atlanta, Georgia.

The apparatus hereinabove authorized to be used and operated is located at:

Cheshire Bridge Road & Seaboard Railway, Atlanta, Georgia. Lat. 33° 48' 38.4" North, Long. 84 21 24.0 West.

and is described as follows: **R.C.A. MFG. CO., Type 5-C, Broadcasting Transmitter. Direct Crystal Control. Last radio stage: two 2.5 kilowatt vacuum tubes for low level modulation (RCA-892). Maximum rated carrier power output 5 kilowatts. Antenna: 279' (289' overall height), self-supporting, uniform cross section, series-fed, vertical radiator. Ground: 180 - 300' average length copper radials.**

Towers painted and lighted in accordance with attached specifications.

For emergency purposes only, when by reason of breakdown [illegible] the said apparatus cannot be used, the licensee is authorized to use and operate (but only in accordance with the terms and conditions of this license) [illegible] radio transmitting apparatus located at:

Cheshire Bridge Road & Seaboard Railway, Atlanta, Georgia.

with power of: **1 kilowatt**

and described as follows: **COMPOSITE - Broadcasting Transmitter. Direct Crystal Control. Last radio stage: one 2.5 kilowatt vacuum tube for low level modulation (RCA-892). Maximum rated carrier power output 2½ kilowatts.**

which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held [illegible] the rules of the Commission prior [illegible] the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held prior to the commencement of this license period.

2. With power of **1 kilo** watts, with an additional **4 kilo** watts from local sunrise to local sunset only. **
   Antenna current **4.58** amperes for **1 kilo** watts; **10.26** amperes for **5 kilo** watts.
   Antenna resistance **47.5** ohms.
3. During the following period or periods of time:
   Unlimited time.

**Average hour of local sunrise: May, 4:30 am; June, 4:30 am; July, 4:30 am; Aug. 5 am; Sep. 5:15 am; Oct. 5:45 am; Nov. 6:15 am; Dec. 6:30 am; Jan. 6:45 am; Feb. 6:30 am; Mar. 5:45 am; Apr. 5:15 am; Central Standard Time.

**Average hour of local sunset: May 6:30 pm; June, 6:45 pm; July, 6:45 pm; Aug. 6:30 pm; Sep. 5:45 pm; Oct. 5pm; Nov. 4:30 pm; Dec. 4:30 pm; Jan. 4:45 pm; Feb. 5:15 pm; Mar. 5:45 pm; Apr. 6:15 pm; Central Standard Time.

4. Under the call letters W G S T
5. With the main studio of the station located at:
   90 Forsyth Street,
   Atlanta, Georgia.

The apparatus hereinabove authorized to be used and operated is located at:

Cheshire Bridge Road & Seaboard Railway, Atlanta, Georgia. Lat. 33° 48' 38.4" North, Long. 84 21 24.0 West.

and is described as follows: **R.C.A. MFG. CO., Type 5-C, Broadcasting Transmitter. Direct Crystal Control. Last radio stage: two 2.5 kilowatt vacuum tubes for low level modulation (RCA-892). Maximum rated carrier power output 5 kilowatts. Antenna: 279' (289' overall height), self-supporting, uniform cross section, series-fed, vertical radiator. Ground: 180 - 300' average length copper radials.**

Towers painted and lighted in accordance with attached specifications.

For emergency purposes only, when by reason of breakdown [illegible] the said apparatus cannot be used, the licensee is authorized to use and operate (but only in accordance with the terms and conditions of this license) [illegible] radio transmitting apparatus located at:

Cheshire Bridge Road & Seaboard Railway, Atlanta, Georgia.

with power of: **1 kilowatt**

and described as follows: **COMPOSITE - Broadcasting Transmitter. Direct Crystal Control. Last radio stage: one 2.5 kilowatt vacuum tube for low level modulation (RCA-892). Maximum rated carrier power output 2½ kilowatts.**

which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held [illegible] the rules of the Commission prior [illegible] the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held prior to the commencement of this license period.

This license is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934. This license is subject to the right of use or control by the Government of the United States conferred by section 606 of the Communications Act of 1934.

Dated this **17th** day of **April**, 19**47**

By direction of the FEDERAL COMMUNICATIONS COMMISSION,

[SEAL]

Secretary.

U. S. GOVERNMENT PRINTING OFFICE 16—3070

WTH

F. C. C. Form No. 71.
(Spec. No. A 2 a 2)
(Adopted May 24, 1944)

Date 4-17-47

File No. BR-411

Call Letters W G S T

(p 24)

OBSTRUCTION MARKING
ANTENNA TOWER(S) OR SUPPORTING STRUCTURE(S)

Each tower shall be painted throughout its height with alternate bands of international orange and white, terminating with international orange at both top and bottom. The width of the international orange bands shall be from 30 to 40 feet. The white bands shall be approximately one-half of the width of the international orange bands.

Each tower shall be cleaned or repainted as often as necessary to maintain good visibility.

For night marking there shall be installed at the top of each tower at least two 100-watt lamps (A-21 clear, Traffic-Signal type) enclosed in aviation red Fresnel or prismatic (heat resisting preferred) obstruction light globes. If only one lamp is operated, the circuit shall be equipped with a relay for instant automatic switchover to the other lamp in case of lamp failure.

On levels at approximately two-thirds and one-third of the over-all height of each tower, there shall be installed at least two 100-watt lamps (A-21 clear, Traffic-Signal type) enclosed in aviation red Fresnel or prismatic (heat resisting preferred) obstruction light globes. Each light shall be mounted so as to insure unobstructed visibility of at least one light on each level from aircraft at any angle of approach.

All lighting shall be exhibited from sunset to sunrise.

At least 25 percent spare lamps shall be provided for immediate replacement purposes.

Note

For lower portion of this page see next frame.

[fol. 92] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

AMENDMENT TO ANSWER OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA—Filed September 25, 1947

Now comes Regents of the University System of Georgia, and with leave of Court first obtained, files this its amendment to its answer:

1. Defendant amends Paragraph 3 of its answer by adding the following: For the months from August, 1945 through August 1947, the net billings of Station WGST, as these words are known and understood in the radio industry and including only the net proceeds actually collected by Station WGST as a result of the operations of the station, together with computations of 15% of each month's net billings, are as follows:

Month		Net Billings	15% Net Billings
August	1945	$36,808.18	$5,521.23
September	1945	38,229.81	5,734.47
October	1945	38,491.76	5,773.76
November	1945	42,588.42	6,388.26
December	1945	45,933.92	6,890.09
January	1946	40,783.21	6,117.48
February	1946	38,641.28	5,796.19
March	1946	38,798.80	5,819.82
April	1946	36,592.51	5,488.88
May	1946	38,851.26	5,827.69
June	1946	41,035.34	6,155.30
[fol. 93]			
July	1946	34,261.20	5,139.18
August	1946	28,553.87	4,283.08
September	1946	31,781.37	4,767.21
October	1946	33,883.84	5,082.58
November	1946	42,666.37	6,369.96
December	1946	43,142.36	6,471.35
January	1947	36,884.16	5,532.62
February	1947	41,207.70	6,181.16
March	1947	39,740.86	5,961.13
April	1947	38,817.35	5,822.60
May	1947	38,187.85	5,728.18
June	1947	43,650.04	6,547.51
July	1947	40,928.20	6,139.23
August	1947	36,197.83	5,429.67
Total			$144,968.63

Unlimited time

**Average hour of local sunrise: Mar. 5:45 a.m.; Apr. 5:15 a.m.; May 4:30 a.m.; June 4:30 a.m.; July 4:30 a.m.; Aug. 5:00 a.m.; Sept. 5:15 a.m.; Oct. 5:45 a.m.; Nov. 6:15 a.m.; Dec. 6:30 a.m.; Jan. 6:45 a.m.; Feb. 6:30 a.m.; CST

6:45 p.m.; Apr. 5:15 p.m.; May 5:30 p.m.; June 6:45 p.m.; July 6:45 p.m.; Aug. 6:30 p.m.; Sept. 5:45 p.m.; Oct. 5:00 p.m.; Nov. 4:30 p.m.; Dec. 4:30 p.m.; Jan. 4:45 p.m.; Feb. 5:15 p.m.; CST

4. Under the call letters W4XAT

5. With the main studio of the station located at:

90 Forsyth Street
Atlanta, Georgia

The apparatus hereinabove authorized to be used and operated is located at:

Cheshire Bridge Road & Seaboard Railway
Atlanta, Georgia

Lat. 33° 48' 38.4" North.
Long. 84 21 24.0 West.

and is described as follows: R.C.A. MFG. CO., Type 5-C, Broadcasting Transmitter. Direct Crystal Control. Last radio stage: two 2.5 kilowatt vacuum tubes for low level modulation (RCA-892). Maximum rated carrier power output 5 kilowatts. Antenna: 279' (289' overall height), self-supporting, uniform cross section, series-fed, vertical radiator. Ground: 120 - 300' average length copper radials.

Towers painted and lighted in accordance with the attached specifications.

For emergency purposes only, when by reason of breakdown or similar reason the said apparatus cannot be used, the licensee is authorized to use and operate (but only in accordance with the terms and conditions of this license) the auxiliary radio transmitting apparatus located at:

Cheshire Bridge Road & Seaboard Railway,
Atlanta, Georgia

with power of: 1 kilowatt

and described as follows: COMPOSITE - Broadcasting Transmitter. Direct Crystal Control. Last radio stage: one 2.5 kilowatt vacuum tube for low level modulation (RCA- 892). Maximum rated carrier power output 2½ kilowatts.

This license is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934. This license is subject to the right of use or control by the Government of the United States conferred by section 606 of the Communications Act of 1934.

Dated this 7th day of March, 1946.

By direction of the FEDERAL COMMUNICATIONS COMMISSION,

[SEAL]

GPO

Secretary.

U.S. GOVERNMENT PRINTING OFFICE 16—3976

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The tower shall be painted throughout its height with alternate bands of international orange and white, terminating with international orange at both top and bottom. The width of the international orange bands shall be from 20 to 40 feet. The white bands shall be approximately one-half of the width of the international orange bands.

The tower shall be cleaned or repainted as often as necessary to maintain good visibility.

For night marking there shall be installed at the top of the tower at least two 100-watt lamps (A–21 clear, Traffic-Signal type) enclosed in aviation red Fresnel or prismatic (heat resisting preferred) obstruction light globes. If only one lamp is operated, the circuit shall be equipped with a relay for instant automatic switchover to the other lamp in case of lamp failure.

On levels at approximately two-thirds and one-third of the over-all height of the tower, there shall be installed at least two 100-watt lamps (A–21 clear, Traffic-Signal type) enclosed in aviation red Fresnel or prismatic (heat resisting preferred) obstruction light globes. Each light shall be mounted so as to insure unobstructed visibility of at least one light on each level from aircraft at any angle of approach.

All lighting shall be exhibited from sunset to sunrise.

At least 25 percent spare lamps shall be provided for immediate replacement purposes.

It is to be expressly understood that the issuance of the foregoing specifications is in no way to be considered as precluding additional or modified marking or lighting as may hereafter be required under the provisions of Section 303(q) of the Communications Act of 1934, as amended.

---

*THIS SPECIFICATION IS A PART OF AND SHALL BE ATTACHED TO THE CURRENT INSTRUMENT OF AUTHORIZATION.

38

82

Wherefore, defendant prays that this amendment be allowed and ordered filed, and that defendant be dismissed hence with its reasonable costs.

Eugene Cook, Attorney General of Georgia; Hamilton Lokey, Deputy Assistant Attorney General of Georgia.

[fol. 94] Order

The above and foregoing amendment to defendant's answer read and considered; the same is allowed and ordered filed.

This 25th day of September, 1947.

Bond Almand, Judge, S.C.A.C.

[File endorsement omitted.]

In Superior Court of Fulton County

[Title omitted]

Demurrer and Motion to Strike Answer—Filed August 28, 1947

Now come the plaintiffs in the above stated case and demur to and move to strike the answer of the defendant, Regents of the University System of Georgia, in the above stated case upon the following grounds, to-wit:

1. The answer of said defendant set forth no defense to the plaintiffs' suit and is insufficient in law and should be stricken.

2. Plaintiffs demur to, and move to strike, paragraphs 8 to 28, both inclusive, of the answer of the said defendant, Regents of the University System of Georgia, upon the following grounds, to-wit:

[fol. 95] (a) The facts set forth in said paragraphs of the said answer constitute no ground or grounds of defense to the plaintiffs' action.

(b) The matters and things set forth in said paragraphs of the answer are res inter alios acta and are in no wise binding upon the plaintiffs and are irrelevant to the action.

(c) The matters and things set forth in said paragraphs of the answer are insufficient within themselves or in connection with any other matter set forth in the answer to constitute any legal defense to the plaintiffs' action, for the reason that the plaintiffs were not parties to any of the proceedings before the Federal Communications Commission referred to in said paragraphs and therefore the plaintiffs are in no wise bound by or affected legally by said matters or by the proceedings referred to in said paragraphs.

(d) The actions of the Federal Communications Commission referred to in said paragraphs, insofar as such actions purported in any wise to affect the rights of the plaintiffs or the liability of the defendant, Regents of the University System of Georgia, under the contract sued upon in this case, were beyond any power, jurisdiction or authority of the Federal Communications Commission, and insofar as said actions are invoked as a defense in this case, the same are null, void, and of no effect, and are not in any wise binding upon the plaintiffs and cannot constitute any defense in this case.

(e) Insofar as the alleged actions, decisions and rulings of the Federal Communications Commission as set forth in said paragraphs of the answer are sought to be invoked or set up as any defense to this action, or as affecting the rights [fol. 96] of the plaintiffs or the obligations of the defendant, Regents of the University System of Georgia, the same are unconstitutional and of no effect; because to allow the same to affect, take away, or diminish the rights of the plaintiffs under the contract sued upon or to affect or relieve the defendant, Regents of the University System of Georgia, of its obligations under said contract, would be to deprive the plaintiffs of their property rights without due process of law contrary to the provisions of the Constitution of Georgia of force at said time, which provided: "No person shall be deprived of life, liberty, or property, except by due process of law," the same being Article I, Section I, Paragraph III of said Constitution, and would be contrary to the provisions of Article I, Section I, Paragraph III of the Constitution of Georgia now of force, which provides: "No person shall be deprived of life, liberty, or property, except by due process of law."

(f) To give to the acts and things set up in said paragraphs of the answer the effect which the defendant seeks to have given them would be to deny the plaintiffs the rights guaranteed to them by Article I, Section I, Paragraph II of the Constitution of the State of Georgia of force at said time, and also by Article I, Section I, Paragraph II of the present Constitution of Georgia, each of which provides; "Protection to person and property is the paramount duty of government, and shall be impartial and complete."

(g) To give to the acts and things set up in said paragraphs of the answer the effect which the defendant seeks to have given to them would be to deny to the plaintiffs the rights guaranteed to them by the Fifth Amendment to the [fol. 97] Constitution of the United States in that it would deprive plaintiffs of their property without due process of law.

(h) To give to the acts and things set up in said paragraphs of the answer the effect which the defendant seeks to have given to them would be to deny to the plaintiffs the rights guaranteed to them by the Fourteenth Amendment to the Constitution of the United States in that they would deprive plaintiff of their property without due process of law.

(i) To give to the acts and things set up in said paragraphs of the answer the effect which the defendant seeks to have given to them would be to deny the plaintiffs the rights guaranteed to them by Article I, Section X, Paragraph 1 of the Constitution of the United States in that the obligation of the contract of the plaintiffs would be impaired.

Wherefore, plaintiff prays that this demurrer be sustained.

James A. Branch, Thomas B. Branch, Jr., Attorneys for the Plaintiff.

[File endorsement omitted.]

[fol. 98] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

Brief of Evidence

APPEARANCES

For the Plaintiffs: Mr. James A. Branch, and Mr. Thomas B. Branch.

For the Defendants: Honorable Eugene Cook, Attorney General of Georgia, and Mr. Hamilton Lokey, Deputy Assistant Attorney General of Georgia.

PRELIMINARY STATEMENT

By agreement of all parties, made in open Court, this case was tried before Honorable Bond Almand on all issues of law and fact, without the intervention of a jury.

By agreement of all parties the evidence in this case was submitted by stipulation and by certain documentary evidence, all of which was admitted without objection.

The defendant Fulton National Bank, by its answer, did not contest the claim of the plaintiffs, merely reporting to the Court that it had in its hands a small balance of funds which it was ready to pay out as directed by the court.

The defendant Regents of the University System of Georgia, by its answer admitted a prima facie case in favor of the plaintiffs, and by further answer set out its affirmative defense. Having admitted a prima facie case, this defendant assumed the burden of proof, and introduced evidence in support of its affirmative defense as follows:

[fol. 99] EVIDENCE ON BEHALF OF DEFENDANT REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

It was stipulated between the parties that defendant Regents of the University System of Georgia (hereinafter called "Regents") paid to plaintiff's agent, The Fulton National Bank, on behalf of the plaintiffs, from April 15, 1943 and up through the month of July, 1945, sums equivalent to fifteen percent of the net billings of Radio Station WGST for that period, in the amount of $149,408.38.

There was admitted in evidence without objection, as defendant's Exhibit 1, a certified copy of an application for renewal of the broadcasting license of the Regents'

Radio Station WGST, dated January 31, 1940 and filed by the Regents with the Federal Communications Commission (hereinafter called the "FCC"), the governmental authority to which the Congress of the United States had delegated control and regulation of licenses for radio broadcasting stations. Said application (Defendant's Exhibit 1) is identical with and is the same as the document set out as Exhibit "A" in defendant's answer, to which reference is hereby made.

It was stipulated between the parties that without such a license from the FCC, Radio Station WGST could not have lawfully operated; that at said time, January 31, 1940, Radio Station WGST was being operated for defendant Regents by a corporation known as Southern Broadcasting Stations, Inc. under a contract which by its terms had until January 6, 1950 to run; that the entire capital stock of said corporation was owned by the plaintiffs in this suit.

[fol. 100] There was admitted in evidence without objection as defendant's Exhibit 2, a certified copy of an order of the FCC, dated March 23, 1943, containing proposed findings of fact and conclusions of the Commission relative to the application for renewal of the license of Radio Station WGST, wherein the Commission, after hearing, determined that the further operation of Radio Station WGST by defendant through Southern Broadcasting Stations, Inc. was in violation of the provisions of the Federal Communications Act of 1934, and was not in the public interest. Said order (Defendant's Exhibit 2) is identical with and is the same as the document set out as Exhibit "B" in defendant's answer, to which reference is hereby made.

There was admitted in evidence without objection, as Defendant's Exhibit 3, a certified copy of an order of the FCC, dated May 8, 1943, adopting the proposed findings of fact and conclusions of the Commission of March 23, 1943 as the findings of fact and conclusions of the Commission relative to the Regent's application for license renewal, in which order the application for renewal was denied without prejudice to the filing of a further application for a renewal of license in accordance with the conclusions reached by the FCC, and in which application the Regents were to set forth the plan of the Regents for the acquisition of the necessary facilities and equipment and for the

business management, representation and control of the future operations of Station WGST. Said order (Defendant's Exhibit 3) is identical with and is the same as the document set out as Exhibit "C" in defendant's answer, to which reference is hereby made.

[fol. 101] There was admitted in evidence without objection, as Defendant's Exhibit 4, a certified copy of the second application for renewal of license, filed by the Regents with the FCC on May 22, 1943, to which application for renewal was attached a copy of the contract of April 15, 1943 between plaintiffs and defendant Regents (and upon which contract the pending suit is based) as the Regents' plan for acquiring the necessary facilities and equipment and the business management, representation and control of the future operations of the radio station. Said application (Defendant's Exhibit 4) is identical with and is the same as the document set out as Exhibit "D" in defendant's answer, to which reference is hereby made.

It was stipulated between the parties that by the contract of April 15, 1943, the Regents acquired all of the capital stock of the Southern Broadcasting Stations, Inc., later procured the transfer of all of the assets of that corporation to the Regents, and thereafter, in July of 1943, the Regents dissolved said corporation by surrendering its charter in Fulton Superior Court.

There was admitted in evidence without objection, as Defendant's Exhibit 5, a certified copy of an order of the FCC, dated October 12, 1943, assigning for hearing before the FCC the matter of the second application for renewal of license filed by the Regents on May 22, 1943. Said order (Defendant's Exhibit 5) is identical with and is the same as the document set out as Exhibit "E" in defendant's answer, to which reference is hereby made.

[fol. 102] There was admitted in evidence without objection, as Defendant's Exhibit 5-A, a copy of certain rules of the FCC which were attached to and referred to in the notice of hearing of October 12, 1943 (Exhibit 5), relative to such matters as appearances, interventions and pleadings. A copy of Defendant's Exhibit 5-A is attached to this brief of evidence, with leave of reference prayed.

There was admitted in evidence without objection, as Defendant's Exhibit 6, a certified copy of a petition filed by the Regents with the FCC on November 4, 1943 for a

grant of the license renewal application dated May 22, 1943 without a hearing. Said petition is identical with and is the same as the document set out as Exhibit "F" in defendant's answer, to which reference is hereby made.

There was admitted in evidence without objection, as Defendant's Exhibit 7, a certified copy of an order of the FCC, dated November 23, 1943, denying the petition of the Regents for the grant of the license renewal without hearing. Said order is identical with and is the same as the document set out as Exhibit "G" in defendant's answer, to which reference is hereby made.

It was stipulated between the parties that subsequent to November 23, 1943 the matter of the license renewal application was heard by the FCC and testimony was given by witnesses for the defendant Regents, including Hon. Ellis Arnall, Governor of Georgia, Marion Smith, Chairman of the Board of Regents, Sandy Beaver and Frank M. Spratlin, members of the Board of Regents, Hon. T. Grady Head, Attorney-General of Georgia, and John Fulton, Manager of Radio Station WGST.

[fol. 103] There was admitted in evidence without objection, as Defendant's Exhibit 8, a certified copy of an order of the FCC, dated September 19, 1945, containing proposed findings of fact and conclusions of the Commission relative to the Regents' second application for license renewal, wherein the Commission, among other things said: "In view of the foregoing, the Commission concludes that the arrangements under the contract of April 15, 1943, would jeopardize the licensee's financial ability to conduct the future operation of the station in the public interest and that, therefore, public interest convenience or necessity would not be served by a grant of the instant application." Said order (Defendant's Exhibit 8) is identical with and is the same as the document set out as Exhibit "H" in defendant's answer, to which reference is hereby made.

It was stipulated between the parties that upon receipt of the notice of the action of the FCC of September 19, 1945, the Regents made no further payment to petitioners under the contract of April 15, 1943.

There was admitted in evidence without objection, as Defendant's Exhibit 9, a certified copy of a resolution passed by the Board of Regents, the governing body of the defendant Regents, on October 11, 1945, directing that no

further payments be made by defendant Regents under said contract. Said resolution (Defendant's Exhibit 9) is identical with and is the same as the document set out as Exhibit "I" in defendant's answer, to which reference is hereby made.

There was admitted in evidence without objection, as Defendant's Exhibit 10, a certified copy of an order of the FCC, dated November 9, 1945, adopting the proposed find-
[fol. 104] ings of fact and conclusions of the Commission of September 19, 1945 as the findings of fact and conclusions of the Commission relative to the Regents' second application for license renewal, in which order the second application for renewal was denied without prejudice to the filing of a further application for renewal, by December 18, 1945, provided the Regents affirmatively showed in said application that it was giving no further effect to the agreements between Georgia School of Technology and Southern Broadcasting Stations, Inc. Said order (Defendant's Exhibit 10) is identical with and is the same as the document set out as Exhibit "J" in defendant's answer, to which reference is hereby made.

There was admitted in evidence without objection, as Defendant's Exhibit 11, a certified copy of the third application for renewal of license, filed by the Regents with the FCC on December 4, 1945. Said application (Defendant's Exhibit 11) is identical with and is the same as the document set out as Exhibit "K" in defendant's answer, to which reference is hereby made.

There was admitted in evidence, without objection, as Defendant's Exhibit 12, a certified copy of a statement attached as an exhibit to said third application for renewal of license, in which the Regents showed affirmatively its actions in regard to cancellation of the contract of April 15, 1943. Said statement (Defendant's Exhibit 12) is identical with and is the same as the document set out as Exhibit "L" in defendant's answer, to which reference is hereby made.

There was admitted in evidence, without objection, as Defendant's Exhibit 13, a certified copy of a radio broad-
[fol. 105] casting station license granted by the FCC to defendant Regents on March 7, 1946, in accordance with the third application filed by the Regents on December 4, 1945, the license covering the period from March 7, 1946 to May

1, 1947. Said license (Defendant's Exhibit 13) is identical with and is the same as the document set out as Exhibit "M" in defendant's answer, to which reference is hereby made.

It was stipulated between the parties that from the time in 1940 when the defendant Regents' previous license expires, until March 7, 1946, when the Regents' subsequent license was issued, the Regents operated Radio Station WGST under temporary licenses granted by the FCC.

There was admitted in evidence, without objection, as Defendant's Exhibit 14, a certified copy of a further renewal of the defendant Regents' license, granted by the FCC, said license covering the period from May 1, 1947 to May 1, 1950. Said license (Defendant's Exhibit 14) is identical with and is the same as the document set out as Exhibit "N" in defendant's answer, to which reference is hereby made.

It was stipulated between the parties that Southern Broadcasting Stations, Inc., which was owned by plaintiffs prior to April 15, 1943, was a party as intervener to the proceedings before the FCC which resulted in the proposed findings of fact and conclusions of the Commission of March 23, 1943, and the final order of the FCC of May 8, 1943, which orders of the Commission are Exhibits 2 and 3 of this brief of evidence (Exhibits "B" and "C" of defendant's answer, to which reference is hereby made); that the proceeding before the FCC in which the corporation, Southern Broadcasting Stations, Inc., was a party by intervention, [fol. 106] was designated by the FCC as "Docket Number 5903."

The following is taken verbatim from the transcript of the testimony in the trial of this case:

Mr. Lokey (attorney for defendant): "The next paragraph is likewise a stipulation, that petitioners had actual knowledge of the filing of the second application for renewal of the license referred to in paragraph twelve of the answer and which was designated by the FCC as Docket number 6534; that petitioners had actual notice of hearing dated October 12th, 1943, referred — in paragraph thirteen of defendant's answer; that petitioners had actual knowledge of the hearing before the FCC and of the proposed decision of the FCC of September 19th, 1945, both referred to in paragraph sixteen of the defendant's answer; that petitioners also had actual knowledge of the final order of

the FCC dated November 9th, 1945, referred to in paragraph eighteen of defendant's answer; that the petitioners had actual knowledge of the above matters at the time said matters were taking place and that under the law petitioners had the right to intervene as parties at interest in Docket number 6534, the same as Southern—that part, of course, is a conclusion. That is not a stipulation.

"The Court: That is contention?

"Mr. Lokey: That is our contention, your Honor. The stipulation ends with the petitioners had actual knowledge of the above matters at the time said matters were taking place, and the rest of it is our contention that under the law the petitioners had a right to intervene in 6534 the same as Southern Broadcasting Stations had intervened in Docket 5903.

[fol. 107] "This is also a stipulation; I believe this is really a matter of law but it is stipulated that at the time the petitioners entered into said contract of April 15, 1943, with defendants they knew that the operation of said radio station depended upon a license to so operate from the FCC and that said operation was subject to Federal regulations and control under the Communications Act of 1934 as administered by the FCC. The petitioners also knew that under said Communications Act of 1934 the FCC had jurisdiction over any contract or agreement affecting the operation of a radio station in the public interest or affecting the present or future financial ability of a radio station to operate in the public interest. It is our contention that—the balance of the paragraph is a contention of ours that the FCC in its orders of September 19th, 1945, and November 9th, 1945, which are Exhibits H and J, I don't recall now what my numbers are over there, that they found this particular contract to be that type of contract and the allegation is made there that the FCC did have jurisdiction over the subject matter and over said contract. We contend that paragraphs four, five and six of Exhibit H and paragraph four of Exhibit J establish the fact that the Commission did find this contract to be that type of contract."

It was stipulated between the parties that in the hearing before the FCC based upon the notice of hearing of October 12, 1943, the evidence as to the value of the equipment of the radio station acquired by defendant Regents from the plaintiffs or Southern Broadcasting Stations, Inc. ranged

[fol. 108] between $40,000.00 and $70,000.00 and that at that time, which was in 1943, such equipment was very difficult, if not impossible, to acquire.

It was stipulated between the parties that the license under which Radio Station WGST was operating in April of 1943 was a temporary license and extension of its prior license, and that said license and extension of said license has expired.

Defendant Regents of the University System of Georgia rests.

EVIDENCE ON BEHALF OF PLAINTIFFS

There was admitted in evidence, without objection, as Plaintiff's Exhibit No. 1, the original contract between the parties, dated April 1943, being the contract sued on, and having attached thereto an inventory of the equipment of Radio Station WGST and a list of outstanding contracts of Southern Broadcasting Stations, Inc. with third parties. Said contract (Plaintiff's Exhibit 1) is identical with and is the same as the document set out as Exhibit "A" of the plaintiff's petition, to which reference is hereby made.

There was admitted in evidence, without objection, as Plaintiff's Exhibit 2 a letter from Clarence H. Calhoun, one of the plaintiffs, to Marion Smith, Chairman of the Board of Regents, dated September 22, 1945. A copy of plaintiff's Exhibit 2 is attached to this brief of evidence, with leave of reference prayed.

There was admitted in evidence without objection as Plaintiff's Exhibit 3, a letter from Sandy Beaver, a member of the Board of Regents, to Clarence H. Calhoun, dated [fol. 109] September 26, 1945. A copy of Plaintiff's Exhibit 3 is attached to this brief of evidence, with leave of reference prayed.

There was admitted in evidence, without objection, as Plaintiff's Exhibit 4, a letter from Clarence H. Calhoun to Marion Smith, dated September 25, 1945. A copy of Plaintiff's Exhibit 4 is attached to this brief of evidence, with leave of reference prayed.

There was admitted in evidence, without objection, as Plaintiff's Exhibit 5, a letter from Clarence H. Calhoun to Marion Smith, dated September 28, 1945. A copy of Plaintiff's Exhibit 5 is attached to this brief of evidence, with leave of reference prayed.

There was admitted in evidence, without objection, as Plaintiff's Exhibit 5, a letter from Marion Smith to Clarence H. Calhoun, dated October 2, 1945. A copy of Plaintiff's Exhibit 6 is attached to this brief of evidence, with leave of reference prayed.

Plaintiffs rest.
The Evidence Was Closed.

DEFENDANT'S EXHIBIT 5-A

Section 1.382 (b). In order to avail himself of the opportunity to be heard, the applicant, in person or by his attorney, shall, within 15 days of the mailing of the notice of designation for hearing by the Secretary, file with the Commission a written appearance stating that he will appear and present evidence on the issues specified in the statement of reasons furnished by the Commission on such date as may be fixed for the hearing. In cases other than [fol. 110] standard broadcast, high frequency broadcast, international broadcast and television, the applicant will accompany his appearance with an additional copy of his application and supporting documents.

Section 1.102. Intervention. Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest and must be subscribed and verified in accordance with Sec. 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of hearing unless on motion the Commission shall amend the same.

Section 1.122. Pleadings. All pleadings (not including applications or amendments thereto) filed by any party represented by an attorney, shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an

attorney shall sign and verify his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings signed by the attorney for a party need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, [fol. 111] information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the matter may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

PLAINTIFF'S EXHIBIT 2

September 22, 1945.

Mr. Marion Smith, Hurt Building, Atlanta 3, Georgia.

MY DEAR MR. SMITH:

I now have a copy of the proposed decision on which I would like to make some comment to you as follows:

I will not touch on the "Preliminary Statement."

Under "Findings of Fact," paragraph 6, they find the value of equipment to be $50,000.00. Equipment was not the consideration of the contract between the stockholders and the Regents. The stockholders sold and transferred all the shares of stock in the corporation which carried with it each and every asset, namely, valuable contracts for sale of time, relationship with the largest and best advertising agencies, nationally and locally, which were acquired at considerable expense to the corporation, valuable service agreements with procuring agencies, employees, prepaid advertising, prepaid insurance premiums, innumer- [fol. 112] able assets such as furnishings including the recent redecorating and refurnishing of the offices and studios, a very favorable lease contract on the premises, in fact, a going business that had been successful and has continued

to be a successful thing. All this in addition to equipment considered in the report.

I say without any fear of contradiction that the position taken by the Commission as to the sale price being restricted by the value of physical equipment is contrary to the rule and has not been followed by the Commission in previous sales and is not being followed today, so they are making an exception of this case. I probably have my opinion as to the reasons for it but I could be wrong so will not suggest same.

I understand as late as yesterday the Commission approved the sale of a station at Fort Lauderdale, Florida, and I am told that the consideration was $500,000.00 and that the probably investment in equipment would not exceed $50,000.00 to $60,000.00. Note the inconsistency here. You could and I would be glad to help you list innumerable like transactions receiving Commission approval. You have only to look around locally and ascertain the consideration for the sale and transfer of WSB many, many times the value of its physical assets. This is an unchallengeable position to take because, of course, the Commission would never accede that these were approved because of the value of a license held by the seller which, under the law, he has no property right in.

I have a strong opinion but reserve the same as to what is the real trouble here and, likewise, what you, as the [fol. 113] applicant, have a right to insist upon. I will discuss this with you or any member of the Board.

I do not question for a minute that the members of the Board entertain any idea that they will not be granted a license for the reason that this is not the policy of the Commission and in the instant case I don't think you could find any person conversant with the policies and practices of the Commission that would accept the statement that they would deny the State of Georgia a license. The informed persons would go along with me on this, I think, 100%.

The whole history of the operation would destroy the conclusions set out under paragraph 2.

The history of the operation, earnings and profits, would destroy the conclusion set out in paragraph 3. The Commission passes over a most important fact and that is that the applicant is the State of Georgia, solvent and able to carry out its contracts.

The brazen suggestion or requirement that the State of Georgia be told that it must repudiate the contract made in good faith and with all the facts before the parties is unheard of and certainly the Commission could not stand up under a sincere and factual presentation of the case.

It is known to me that the Commission through its Chairman gave to this Board the privilege of making the contract they thought was right and fair, therefore, the Board has every right to pursue its application for license and receive the same, notwithstanding the untenable position that the Commission takes. I would like to be cooperative with the Board in working this out.

[fol. 114] Please do not consider too lightly the fact that the Commission is not following its policy and procedure in attempting to set up value on physical assets as a yardstick for the sale of the Company because you will find very easily that this has not been their policy. That they are permitting these sales constantly where the consideration of the sale far exceeds such assets.

The question is raised that the obligations of the contract to pay commissions for the remaining years could become a burden on the State that would impair its operation to the extent of showing an operating loss rather than a profit. Again, past operations and results year by year refute this but, nevertheless, their fear of this can be easily overcome should the contracting parties enter into a stand-by agreement providing that in any year that by ordinary accounting methods this was determined that the State's obligation to pay would be postponed. This certainly takes the fight out of the Commission's position. It must be said that they have nothing to support these conclusions, they are wholly without any evidence or any experience to support such findings.

With kindest regards, I am

Very truly yours, Clarence H. Calhoun.

CHC:MM.

[fol. 115] PLAINTIFF'S EXHIBIT 3

September 26, 1945.

Mr. Clarence H. Calhoun, 710 Rhodes-Haverty Building, Atlanta, Georgia.

MY DEAR CLARENCE:

The copy of your letter to Mr. Marion Smith answers all the questions I have in mind, and I presume that he will take the necessary legal steps to protect your and our interests.

If it develops that you think I can be of service, do not hesitate to command me.

In the meantime, with every good wish, believe me,

Sincerely yours, (S.) (Sandy Beaver.)

SB;ed

PLAINTIFF'S EXHIBIT 4

September 25, 1945.

Mr. Marion Smith, Hurt Building, Atlanta 3, Georgia.

DEAR MR. SMITH:

I realized when I made broad statements to you that you would expect me to present competent proof and I believe I have it and submit the following:

Annually a report of Committee on Appropriations, gen-[fol. 116] erally sub-committee does the work, for independent office expenses is filed with the Appropriation Committee and a copy of this goes into the Communications Commissions Library. Also any member of the Committee, and I believe our friend, Sidney Camp is a member of this Committee, will furnish any number of copies of this report, so it is from this report that Mr. Porter has furnished me with the following statistical information on sales of broadcast stations.

Date	Station	Replacement Costs	Sales Price
1939	WSB	$286,507.00	$1,826,125.00
1940	WAGA	$116,000.00	Of 60% $ 100,000.00 (see below)
1941	WFTL	$ 10,395.00	$ 50,000.00
1944	WFTL	$171,000.00	$ 275,000.00 (See note below)
1942	WMCA	$431,000.00	$1,225,000.00
1944	WSAI	$145,634.00	$ 550,000.00
1944	KJBF	$ 46,595.00	$ 200,000.00
1944	KQV (Pittsburgh)	$ 29,642.60	$ 575,000.00
1944	WINX	$ 58,000.00	$ 500,000.00 (See below)
1944	WJJD (Daytime Only)	$183,211.00	$ 696,000.00
1944	WBEM	$181,045.00	$ 620,000.00
1944	WQXR	$ 79,000.00	$ 987,000.00 (See below)
1945	WLW Estimate	$700,000.00	$5,000,000.00 (See note below)

WAGA when sold in 1940 had been a constant and continuous headache. It lost money and showed no profits, but 60% of the $116,000.00 replacement which was largely building improvements downtown, was sold for $100,000.00 [fol. 117] but despite this, the sale for $69,600.00 at $100,000.00 was approved.

WFTL, and note the sale price, has been notoriously known as a station showing constant losses and large expenditures were made to improve frequency, increased power, add new equipment, and still was sold and transferred at the figure shown.

KQV was pointed out by Mr. Porter as probably the most comparable station to WGST, note the figures on it.

WINX is not a regional station, it is a 250 watt transmitter classed as strictly local station.

WJJD, you will note, is restricted to daytime use, generally regarded as not a good operation.

WQXR—this one deserves special attention. Not the letters themselves—they indicate this is not standard broadcast, that is, not in the standard broadcast band. Its frequency being 1560 which is high frequency and many sets will not pick it up, but not the sale. This was sold to New York Times.

WLW is really a great station but the report will show you that the petitioners did not disclose the amount allocated to the radio station which was bought in connection with other Crosley properties, nor did they disclose the stock-

holders of the purchasing Company. This has always been a matter of the strictest requirement of information to be furnished but it has come up for discussion and finally the figures I gave you were made known, but not until after Commission approval was had.

I feel that I have demonstrated that my discussion with you and my representations to you were not pure conver- [fol. 118] sation. Mr. Porter tells me that there are many others that could be dug up for he says he can recall no station where the Commission has taken any such position as they are taking in your case.

It is not conceivable that the State of Georgia should not be shown the same treatment as private traders to which you, of course, will agree. If there is to be any favoritism shown as between private traders and the State of Georgia, I would think that the preference would be shown to Georgia.

I discussed procedure and remedies and personnel with Mr. Porter and I would be glad to discuss this with you at your convenience.

I beg to suggest that request for oral hearing must be made within 20 days. Other procedure can come later. I know you will keep my communication confidential to the extent that it will not be passed on to parties representing you for the resentment would be great when they realize that I have pointed out these things to you, probably unknown to you and not used in your behalf.

Very truly yours, Clarence H. Calhoun.

CHC:MM

[fol. 119] PLAINTIFF'S EXHIBIT 5

September 28, 1945.

Mr. Marion Smith, Chairman, Hurt Building, Atlanta 3, Georgia.

DEAR MR. SMITH:

I have given some further thought to procedure which I think is entirely proper and necessary on behalf of the Board of Regents looking to the protest to the Commission's proposing order and the procuring of favorable order in its stead and in behalf of the former stockholders

of Southern Broadcasting Stations, Inc., I would request that you give it serious consideration and take some action thereon.

The Commission has gone a very long way in the hunt for reasons to refuse or deny your pending application for a license. The former stockholders of SBS and the Board of Regents now operating WGST are completely divorced from any operation of WGST, and there remains only contract of purchase by the State of the stock of the SBS. Contract was made more than two years ago after conferences with the Commission and a mode of payment and amount of payment considered fair and satisfactory to both parties fixed in the contract. This contract is a subject over which they had no jurisdiction in the first place, and in the second place, have referred to Congress, and in the third place have exercised no jurisdiction over such agreements and have issued licenses where the consideration was in keeping with consideration in the contract under question and greater. [fol. 120] I have heretofore given you some demonstrations of this.

I recommend and urge the following procedure:

1. Request for oral argument.
2. Exceptions to the proposed order.
3. The adoption of appropriate resolution by the appropriate authorities, namely the Committee of the Board of Regents detailed to handle the operation of WGST in which the authority would guarantee future operating expenses of WGST during the remainder of the contract period or until December 31, 1949.

This to become a part of the petition to reopen the record and have such resolution included therein without further formal proceedings filed. It is essential to have this a part of the record.

With such evidence before the Commission, additional proposed findings would be in order.

If the future proposed findings should be of the same purport as the present ones, you will have firmly nailed the Commission down to the single proposition that the amount of money to be paid by the State is excessive. This is a subject matter over which they have no jurisdiction and which they left to the good judgment and conscience of the

Board of Regents, and to which they have no legal right to resort.

It would follow that they would issue additional proposed findings and if found to be of the same tenor as at present, assuming that the exceptions had been filed and the oral argument requested, counsel for the Regents should appear and make a very brief argument to the general effect:

[fol. 121] "There is no question in this record as to the technical, financial and legal ability of Georgia School of Technology to continue the operation of the station. The Commission has already found that the State will have entire and complete control of the station, its programs and operation, and that any semblance of the former control by other persons has been fully removed. Therefore, there is presented the lone question as to whether the Commission will assume jurisdiction upon the question of price to be paid for equipment and insert its judgment on that question. In this connection the Commission either has refused in the past to assume jurisdiction or has approved purchase prices far in excess of that now involved in the long list of cases (and here cite the cases). Furthermore, in one of the cases cited, Commission did not even have before it the amount of money involved in the transaction although it approved the transfer of license.

"Therefore, the case has now become a clear-cut one and the Commission may be assured from the record and the representations made to it by the highly responsible officials in charge of the station operation, namely the Regents of the University of Georgia, will take every lawful course within its means to effect a correct interpretation of the law."

I must apologize, of course, for suggesting the sort of argument to be used but I am moved to do this upon advice of competent authority, well-skilled in procedure, the acts and doings of the Commission.

I am not unmindful that you recognize the obligations of the contract made with those with whom I am associated [fol. 122] and that you believe firmly that it was fair then and should be discharged and that you are willing to discharge the obligations undertaken therein. I hope that you

will give consideration to these suggestions and take steps to prevent a final order passed on the proposed order.

My kindest regards to you, I am

Very truly yours, Clarence H. Calhoun.

CHC:MM

PLAINTIFF'S EXHIBIT 6

October 2, 1945.

Mr. Clarence H. Calhoun, 710 Rhodes-Haverty Bldg., Atlanta, Ga.

DEAR CLARENCE:

I have your letter of the 28th.

As I feel at present I do not think we can carry this litigation further. I think the result the Commission has reached is unfair, but I think we have presented everything we could present to them. I am ready to work along any lines that would treat your group fairly without imperiling the status of the license, and as I explained to you when you were in the office will try to find out what would be approved along this line by the Commission.

I am sending your letter and a copy of this reply to Frank Spratlin, Chairman of our Special Committee, and you of course are at liberty to discuss it further with him and with the Committee.

Very truly yours, (S.) Marion Smith.

MS-G

Copy—Mr. Spratlin—With enclosure. MS.

[fol. 123] NOTICE

To Honorable James A. Branch, Thomas B. Branch, Jr., Attorneys for W. E. Carroll, et al., Hurt Building, Atlanta, Georgia:

Please take notice that the above and foregoing brief of evidence will be presented to Honorable Bond Almand, Judge of the Fulton Superior Court, for approval at the Fulton County Court House, Atlanta, Georgia, at 9:30 a. m.

Wednesday morning, October 29. You are invited to be present at that time.

This October 28, 1947.

Hamilton Lokey, Attorney for Regents of the University System of Georgia.

We the undersigned attorneys for W. E. Carroll, et al., plaintiffs in the above entitled matter, hereby acknowledge service of the above and foregoing notice, and acknowledge service of a copy of the proposed brief of evidence in this case, and hereby waive such notice and consent for the court to approve the above and foregoing as the brief of evidence in this case.

This 29 day of October, 1947.

J. A. Branch, (by H. L.), Thomas B. Branch, Jr., (by H. L.), Attorneys for W. E. Carroll, et al.

[fol. 124] In Superior Court of Fulton County

Fulton Superior Court, Number A-937

W. E. Carroll, et al.

vs.

Regents of the University System of Georgia

Judge's Certificate to Brief of Evidence—October 29, 1947

I, Bond Almand, Judge of the Fulton Superior Court (Atlanta Circuit), do approve the foregoing brief of evidence in the case of W. E. Carroll, et al. vs. Regents of the University System of Georgia, Number A-937, Fulton Superior Court, consisting of pages 1 through 9, and the attached exhibits to said brief of evidence, being defendant's Exhibit 5-A and plaintiff's Exhibits 2, 3, 4, 5, and 6, consisting of pages 10 through 22, as a true and correct brief of evidence adduced upon the trial of the foregoing case before me on September 25, 1947. The Clerk of the Fulton Superior Court is directed to file said brief of evidence and a copy of this order as a part of the records in this case.

This 29th day of October, 1947.

Bond Almand, Judge, Fulton Superior Court, (Atlanta Circuit.)

[File endorsement omitted.]

[fol. 125] IN SUPERIOR COURT OF FULTON COUNTY

Number A-937, Fulton Superior Court

W. E. CARROLL, et al.

v.

REGENTS OF THE UNIVERSITY, SYSTEM OF GEORGIA, et al.

FINDINGS OF FACT AND LAW—Filed October 6, 1947

STATEMENT OF CASE

The above stated case has been submitted to the Court for final trial and disposition without the intervention of a jury upon all issues of fact and law and with the right of either party to except to the judgment and order entered herein.

The case was submitted to the Court upon the pleadings, agreed stipulation of the parties as to facts, and certain documentary evidence.

There is no dispute between the parties as to the material and essential facts in this case. There is no contention that the contract between the plaintiffs and defendant Board of Regents of April 15, 1943, is invalid or unenforceable by reason of fraud on the part of the plaintiffs which would legally relieve the defendant Board of Regents from performing such contract. There is no evidence before the Court to show that at the time the contract was consummated the defendant Board of Regents did not believe that the consideration paid for the purchase of the stock in the Southern Broadcasting Stations, Inc. was a fair and just consideration. There is nothing in the contract of April 15, 1943, that indicates that the validity or enforcement of the contract was subject to any act of approval or disapproval of the Federal Communications Commission, nor does the Court find anything in the record or the Act of Congress [fol. 126] creating the Federal Communications Commission that requires the plaintiffs to intervene in the Federal Communications Commission proceeding or that required the plaintiffs to appeal the order of September 19th, 1945.

Findings of Fact and Law

From a consideration of the evidence and the law applicable thereto the Court concludes as follows:

1. The plaintiffs have fully complied as of this date with all the conditions and obligations required of them under the contract dated April 15, 1943, between the plaintiffs and the defendant Board of Regents.

2. The Board of Regents after acquiring the stock of the plaintiffs in the Southern Broadcasting Stations, Inc. has surrendered its charter and placed the title to all the physical assets formerly owned by the corporation in the Board of Regents and is not now in a position to restore the parties to the status they occupied on April 15, 1943.

3. The plaintiffs were not parties to the proceedings before the Federal Communications Commission entitled "In the matter of the application of Georgia School of Technology (WGST), Atlanta, Georgia. For renewal of license. Docket Number 6534."

4. The Federal Communications Commission was without jurisdiction to nullify, change or anywise modify the duties and obligations of the parties to the contract of April 15, 1943.

5. That portion of the order of the Federal Communications Commission of November 9th, 1945, to-wit:

[fol. 127] "It Is Further Ordered, Upon consideration of the entire record that the application of Georgia School of Technology for renewal of the license of Station WGST, Be, and it Is Hereby, Denied without prejudice, however, to the submission before December 18, 1945, by the Georgia School of Technology, of a new application for a construction permit and license to operate on the same frequency, provided it is affimatively shown that no further effect is given to the agreements between the Georgia School of Technology and Southern Broadcasting Stations, Inc., which the Commission has found in Docket 5903 and in this proceeding to be contrary to the Communications Act and incompatible with the operation of the station in the public interest." does not constitute a valid defense or bar as a matter of fact or law to the right of the plaintiffs to enforce the provisions of the contract of April 15, 1943, on

the ground that said order has rendered performance on the part of the defendant Board of Regents impossible.

6. The defendant Board of Regents cannot now assert that the physical properties, equipment and other assets received by the defendant Board of Regents from the plaintiffs and Southern Broadcasting Stations, Inc. was less in value than the amount of money that has been paid the plaintiffs under the contract to August, 1945.

7. The plaintiffs are entitled to have the defendant Board of Regents to account to them for fifteen per cent of the net billings received by the defendant Broad of Regents from the operation of Radio Station WGST from August 1, 1945, to September 1, 1947.

8. That on a proper accounting from the date of the defendant Board of Regents' last payment under this con- [fol. 128] tract (month of July, 1945) to September 1st, 1947, the defendant Board of Regents is found to be indebted to the plaintiffs according to the monthly tabulation set out in the amendment filed by the Board of Regents on September 25, 1947, with interest at seven per cent per annum on each monthly statement from the due date of each monthly account.

In support of the above and foregoing conclusions the Court cites the following authorities: *Radio Station W. O. W., Inc. v. Johnson,* 326 U. S. 120; also same case in 14 N. W. (2d) 666; *Southern Broadcasting Corporation v. Carlson,* 178 Sou. 505; Code Section 20-903. As to the contention that the plaintiffs knew that performance on the part of the Board of Regents was dependent upon the operation of the radio station and that such operation was dependent upon the granting of the license by the Federal Communications Commission, and, therefore the plaintiffs' rights stand or fall by what the Communications Commission did in this case, see *Malbern etc. Co. v. Chicago etc. Co.,* 182 Fed. 685 (C. C. Ark.) which holds that a railroad is not justified in refusing to observe a contract with another company for a division of rates on through shipments, apparently valid, because of an opinion of the Interstate Commerce Commission delivered in a proceeding to which neither of the companies was a party. Also the case of *Watson Brothers etc. Co. v. Jaffa Et Al.,* 143 Fed. (2d) 340 (C. C. 8th). In this case the

plaintiff sought to require the specific performance of certain agreements with the defendants relevant to the leasing of certain interstate trucking lines to the plaintiff with [fol. 129] option to purchase, and the defendants sought to defend on the basis that the right of the plaintiffs to operate over these lines had not been approved by the Interstate Commerce Commission, and therefore, the defendants could not be compelled to perform their agreement. As to this contention the Court said:

"Very Broad and comprehensive powers are conferred upon the Interstate Commerce Commission in all matters of interstate transportation, and in the exercise of its power to grant or to deny its approval to applicants for authority to operate particular interstate trucking routes it undoubtedly may hear and determine disputes between rival claimants asserting the right to carry on the same operation. In such disputes the public interest is paramount and it is for the Commission to identify and to protest the public interest in the first instance."

. . . . . .

"But the Commission remains an administrative board exercising administrative power, and is not a court, and has no judicial power, although it has and exercises a quasi judicial power."

. . . . . .

"On the other hand, a suit in equity to compel specific performance of a contract is in its nature a purely judicial action and the court which otherwise has jurisdiction may not refuse to take cognizance of it because of a mere possibility that the questions involved might be brought before an administrative tribunal. If the pleadings presented a case in equity, the court should not have dismissed it without trial of the mertis." *

[fol. 130] "It is contended for Jaffa and Holdcroft that it was beyond the power of the District court to grant any effective relief to Watson Bros., Inc., in this action because even if Jaffa were compelled by the court's decree to execute the documents required by the order of the Commission, such documents would not of themselves vest the right to operate

* [sic].

Jaffa's trucking routes in Watson Bros., Inc., and it is pointed out that all such transfers of operating rights over interstate trucking routes are without validity except as they are approved by the Commission. 49 U. S. C. A. Section 5 (2)."

"But a man's obligation under his lawful contract is not a whit less binding upon him because of the fact that an approval of the transaction must be had before the party to whom he has obligated himself can receive full benefits. The power vested in the Commission in respect to transfers of interstate trucking routes does not relegate the owners of such routes to the status of non compos persons. Such owners remain fully responsible in morals, law and equity on such undertakings as they enter into in respect to their routes. The fact that Jaffa's agreement with Watson Bros., Inc., could not of itself enable Watson Bros., Inc., to operate the routes did not justify refusal of the court to try the charge that Jaffa had become bound to fulfill the obligation undertaken by him. The mere fact that a contract or transfer is subject to the approval of a public agency is not a bar to a decree compelling a party to execute the documents necessary for the consummation of the contract or transfer." (Pages 345, 346.)

[fol. 131] Compare *Goodrum Tobacco Company v. Potts-Thompson Liquor Company*, 133 Ga., 776.

Counsel for the plaintiffs may submit to the Court on the 10th day of October, 1947, at 9:30 A. M. o'clock a final judgment and decree in accordance with the above findings.

This October 6, 1947.

Bond Almand, Judge, Superior Court, Atlanta Circuit.

[File endorsement omitted.]

Georgia,
Fulton County:

Be it remembered: That on the 25th day of September, 1947, and during the September Term, 1947, of the Fulton Superior Court, there came on to be heard before the Honorable Bond Almand, one of the judges of the Superior Court of Fulton County (Atlanta Circuit), then and there presiding, the case of W. E. Carroll, Clarence H. Calhoun, Mrs.

Mattie J. Pickard, Mrs. Emma B. Moore, and Sam Pickard, Trustee for Sam Pickard, Jr., as plaintiffs, versus Regents of the University System of Georgia, a corporation under the laws of Georgia, and Fulton National Bank, a corporation, as defendants, the same being case Number A-937 in said Court, said case coming on to be heard on all issues of law and fact before the Court without the intervention of [fol. 132] a jury, by agreement of the parties.

Be it further remembered; That said case was an action for an accounting between the parties based upon a contract between the parties executed in April, 1943, and for other equitable relief.

Be it further remembered: That at said time and place said case came on for trial upon an agreed statement of facts, stipulations of the parties, and certain documentary evidence introduced without objection, and after presentation of testimony and oral argument of counsel, the matter was submitted to the Court on all issues of law and fact, without the intervention of a jury, by agreement of all parties.

Be it further remembered: That after hearing all of the evidence and argument of counsel, the said Court took the case under advisement and on the sixth day of October, 1947, rendered and entered a preliminary order, judgment and decree therein, as follows:

"Number A-937, Fulton Superior Court

W. E. Carroll et al.

v.

Regents of the University System of Georgia et al.

"Statement of Case

"The above stated case has been submitted to the Court for final trial and disposition without the intervention of a jury upon all issues of fact and law and with the right of either party to except to the judgment and order entered herein.

"The case was submitted to the Court upon the pleadings, agreed stipulation of the parties as to facts, and certain [fol. 133] documentary evidence.

"There is no dispute between the parties as to the material and essential facts in this case. There is no contention

that the contract between the plaintiffs and defendant Board of Regents of April 15, 1943, is invalid or unenforceable by reason of fraud on the part of the plaintiffs which would legally relieve the defendant Board of Regents from performing such contract. There is no evidence before the Court to show that at the time the contract was consummated the defendant Board of Regents did not believe that the consideration paid for the purchase of the stock in the Southern Broadcasting Stations, Inc. was a fair and just consideration. There is nothing in the contract of April 15, 1943, that indicates that the validity or enforcement of the contract was subject to any act of approval or disapproval of the Federal Communications Commission, nor does the Court find anything in the record or the Act of Congress creating the Federal Communications Commission, that requires the plaintiffs to intervene in the Federal Communications Commission proceeding or that required the plaintiffs to appeal the order of September 19th, 1945.

"Findings of Fact and Law

"From a consideration of the evidence and the law applicable thereto the Court concludes as follows:

"1. The plaintiffs have fully complied as of this date with all the conditions and obligations required of them under the contract dated April 15, 1943, between the plaintiffs and the defendant Board of Regents.

[fol. 134] "2. The Board of Regents after acquiring the stock of the plaintiffs in the Southern Broadcasting Stations, Inc. has surrendered its charter and placed the title to all the physical assets formerly owned by the corporation in the Board of Regents and is not now in a position to restore the parties to the status they occupied on April 15, 1943.

"3. The plaintiffs were not parties to the proceedings before the Federal Communications Commission entitled '(In the matter of the application of Georgia School of Technology (WGST), Atlanta, Georgia. For renewal of license. Docket Number 6534.'

"4. The Federal Communications Commission was without jurisdiction to nullify, change or anywise modify the duties and obligations of the parties to the contract of April 15, 1943.

"5. That portion of the order of the Federal Communications Commission of November 9, 1945, to-wit:

'It is further ordered, Upon a consideration of the entire record that the application of Georgia School of Technology for renewal of the license of Station WGST, be and it is hereby, denied without prejudice, however, to the submission before December 18, 1945, by the Georgia School of Technology, of a new application for a construction permit and license to operate on the same frequency, provided it is affirmatively shown that no further effect is given to the agreements between the Georgia School of Technology and Southern Broadcasting Stations, Inc., which the Commission has found in Docket 5903 and in this proceeding to be contrary to the Communications Act and incompatible with the operation of the station in the public interest.' does not [fol. 135] constitute a valid defense or bar as a matter of fact or law to the right of the plaintiffs to enforce the provisions of the contract of April 15, 1943, on the ground that said order has rendered performance on the part of the defendant Board of Regents impossible.

"6. The defendant Board of Regents cannot now assert that the physical properties, equipment and other assets received by the defendant Board of Regents from the plaintiffs and Southern Broadcasting Stations, Inc. was less in value than the amount of money that has been paid the plaintiffs under the contract to August, 1945.

"7. The plaintiffs are entitled to have the defendant Board of Regents to account to them for fifteen per cent. of the net billings received by the defendant Board of Regents from the operation of Radio Station WGST from August 1, 1945, to September 1, 1947.

"8. That on a proper accounting from the date of the defendant Board of Regents' last payment under this contract (month of July, 1943) to September 1st, 1947, the defendant Board of Regents is found to be indebted to the plaintiffs according to the monthly tabulation set out in the amendment filed by the Board of Regents on September 25, 1947, with interest at seven per cent. per annum on each monthly statement from the due date of each monthly account.

"In support of the above and foregoing conclusions the Court cites the following authorities: *Radio Station W.*

O. W., Inc. v. Johnson, 326 U. S. 120; also same case in 14 N. W. (2d) 666; *Southern Broadcasting Corporation v. Carlson*, 178 Sou. 505; Code Section 20-903. As to the contention that the plaintiffs knew that performance on the [fol. 136] part of the Board of Regents was dependent upon the operation of the radio station and that such operation was dependent upon the granting of the license by the Federal Communications Commission, and, therefore, the plaintiffs' rights stand or fall by what the Communications Commission did in this case, see *Malbern etc. Co. v. Chicago etc. Co.*, 182 Fed. 685 (C. C. Ark.) which holds that a railroad is not justified in refusing to observe a contract with another company for a division of rates on through shipments, apparently valid, because of an opinion of the Interstate Commerce Commission delivered in a proceeding to which neither of the companies was a party. Also the case of *Watson Brothers etc. Co. v. Jaffa Et Al.*, 143 Fed. (2d) 340 (C. C. 8th). In this case the plaintiff sought to require the specific performance of certain agreements with the defendants relevant to the leasing of certain interstate trucking lines to the plaintiff with option to purchase, and the defendants sought to defend on the basis that the right of the plaintiffs to operate over these lines had not been approved by the Interstate Commerce Commission and, therefore, the defendants could not be compelled to perform their agreement. As to this contention the Court said:

"'Very Broad and comprehensive powers are conferred upon the Interstate Commerce Commission in all matters of interstate transportation, and in the exercise of its power to grant or to deny its approval to applicants for authority to operate particular interstate trucking routes it undoubtedly may hear and determine disputes between rival claimants asserting the right to carry on the same operation. In such disputes the public interest is paramount [fol. 137] and it is for the Commission to identify and to protest the public interest in the first instance.'"

* * * * * * *

"'But the Commission remains an administrative board exercising administrative power, and is not a court, and has no judicial power, although it has and exercises a quasi judicial power.'

* * * * * * *

" 'On the other hand, a suit in equity to compel specific performance of a contract is in its nature a purely judicial action and the court which otherwise has jurisdiction may not refuse to take cognizance of it because of a mere possibility that the questions involved might be brought before an administrative tribunal. If the pleadings presented a case in equity, the court should not have dismissed it without trial of the mertis.'*

" 'It is contended for Jaffa and Holdcroft that it was beyond the power of the District Court to grant any effective relief to Watson Bros. Inc., in this action because even if Jaffa were compelled by the court's decree to execute the documents required by the order of the Commission such documents would not of themselves vest the right to operate Jaffa's trucking routes in Watson Bros. Inc., and it is pointed out that all such transfers of operating rights over interstate trucking routes are without validity except as they are approved by the Commission. 49 U. S. C. A. section 5 (2).'

'But a man's obligation under his lawful contract is not a whit less binding upon him because of the fact that an approval of the transaction must be had before the party [fol. 138] to whom he has obligated himself can receive full benefits. The power vested in the Commission in respect to transfers of interstate trucking routes does not relegate the owners of such routes to the status of non compos persons. Such owners remain fully responsible in morals, law and equity on such undertakings as they enter into in respect to their routes. The fact that Jaffa's agreement with Watson Bros., Inc., could not of itself enable Watson Bros., Inc., to operate the routes did not justify refusal of the court to try the charge that Jaffa had become bound to fulfill the obligation undertaken by him. The mere fact that a contract or transfer is subject to the approval of a public agency is not a bar to a decree compelling a party to execute the documents necessary for the consummation of the contract or transfer.'

(Pages 345, 346.)

"Compare Goodrum Tobacco Company v. Potts-Thompson Liquor Company, 133 Ga., 776.

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* [sic].

"Counsel for the plaintiffs may submit to the Court on the 10th day of October, 1947, at 9:30 A. M. o'clock a final judgment and decree in accordance with the above findings.

"This October 6, 1947.

"(Signed) Bond Almand, Judge, Superior Court, Atlanta Circuit."

[fol. 139] 1. To that part of said order, judgment and decree which reads as follows:

"4. The Federal Communications Commission was without jurisdiction to nullify, change or anywise modify the duties and obligations of the parties to the contract of April 15, 1943," defendant, Regents of the University System of Georgia then and there excepted upon the ground that same was contrary to law, and now excepts thereto and assigns said ruling and judgment as error as being contrary to law, and says that the Court erred in ruling that the Federal Communications Commission was without jurisdiction to nullify, change or in any way modify the duties and obligations of the parties to the contract in question, because:

(a) Under the law, and under the uncontroverted evidence in this case, the parties to said contract knew that the operation of Radio Station WGST depended upon the grant of a license to so operate from the said Federal Communications Commission, and said operation was subject to federal regulation and control under the Communications Act of 1934, as administered by the Federal Communications Commission, and the contract of April 15, 1943, was made with reference to that law.

(b) The parties also knew that under said Communications Act of 1934, the Federal Communications Commission had jurisdiction over any contract or agreement affecting the operation of a radio station in the public interest, or affecting the present or future financial ability of a radio station to operate in the public interest, and the contract of April 15, 1943, was made with reference to that law.

[fol. 140] (c) The Federal Communications Commission found the Contract of April 15, 1943, to be such a contract over which it had jurisdiction, and the Federal Communications Commission did have jurisdiction over the subject matter and over said contract.

(d) The decision of the Federal Communications Commission that the contract was one over which it had jurisdiction because it affected the ability of the radio station to function in the public interest, cannot be collaterally attached * in the Fulton Superior Court, and the Fulton Superior Court cannot substitute its judgment as to the effect of the contract upon the ability of the station to function in the public interest for the judgment of the Federal Communications Commission on that subject, and to so hold is to substitute the Fulton Superior Court for the agency designated by Congress as the forum for such matters in a field in which federal power is exclusive.

2. To that part of said judgment, order or decree, which reads as follows:

"5. That portion of the order of the Federal Communications Commission of November 9, 1945, to wit:

" 'It is further ordered, upon consideration — the entire record that the application of Georgia School of Technology for renewal of the license of Station WGST, be, and it is hereby, denied without prejudice, however, to the submission before December 18, 1945, by the Georgia School of Technology, of a new application for a construction permit and license to operate on the same frequency, provided it is affirmatively shown that no further effect is given to the agreements between the Georgia School of Technology and [fol. 141] Southern Broadcasting Stations, Inc., which the Commission has found in Docket 5903 and in this proceeding to be contrary to the Communications Act and incompatible with the operation of the station in the public interest.' does not constitute a valid defense or bar as a matter of fact or law to the right of the plaintiffs to enforce the provisions of the contract of April 15, 1943, on the ground that said order has rendered performance on the part of the defendant Board of Regents impossible." defendant, Regents of the University System of Georgia, then and there excepted as being contrary to law, and now excepts and assigns said judgment and ruling as error as being contrary to law, and says that under the law and the uncontroverted evidence in said case, further performance of the contract of

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* [sic].

April 15, 1943, was rendered impossible by the action of the Federal Communications Commission, which action is equivalent to an act of law, and that under the ruling of the Federal Communications Commission a license to operate the radio station would not be granted so long as any force and effect were given to said contract by the defendant.

3. To that part of said judgment, order and decree, which reads as follows:

"6. The defendant Board of Regents cannot now assert that the physical properties, equipment and other assets received by the defendant Board of Regents from the plaintiffs and Southern Broadcasting Stations, Inc. was less in value than the amount of money that has been paid the plaintiffs under the contract of August, 1945.", defendant, Regents of the University System of Georgia, then and [fol. 142] there excepted as being contrary to law and now excepts and assigns said judgment and ruling as error as being contrary to law, because, under the law, specific performance of the contract of April 15, 1943, cannot be had, and no action lies as for breach of contract, but in equity the parties are not without a remedy, they having the right to an adjustment of equities under the doctrine of equitable rescission, and it was proper to assert and prove by uncontradicted evidence that the physical properties, equipment, and other assets received by the defendant, Regents of the University System of Georgia, from the plaintiffs, was less in value than the amount of money already paid to the plaintiffs under the contract.

4. To that part of said judgment, order and decree, which reads as follows:

"7. The plaintiffs are entitled to have the defendant Board of Regents to account to them for fifteen per cent. of the net billings received by the defendant Board of Regents from the operation of Radio Station WGST from August 1, 1945, to Sept. 1, 1947, defendant, Regents of the University System, then and there excepted as being contrary to law, and now excepts and assigns said judgment and ruling as error, as being contrary to law, because:

(a) Under the law and the uncontroverted evidence in said case, said ruling amounts to an order for specific performance of the contract for the payment of money.

(b) Said order and ruling amounts to an order for specific performance of a contract, the performance of which will result in a violation of law, and a violation of a valid order and ruling of the Federal Communications Commis- [fol. 143] sion, the agency designated by the Congress of the United States to administer and carry out the provisions of the Communications Act of 1934, the operation of said radio station being subject to said law and subject to the exclusive jurisdiction of said federal agency.

5. To that part of said judgment, order or decree which reads as follows:

"8. That on a proper accounting from the date of the defendant Board of Regents' last payment under this contract (month of July, 1943) to September 1st, 1947, the defendant Board of Regents is found to be indebted to the plaintiffs according to the monthly tabulation set out in the amendment filed by the Board of Regents on September 25, 1947, with interest at seven per cent. per annum on each monthly statement from the due date of each monthly account.", defendant, Regents of the University System of Georgia then and there excepted as being contrary to law, and now excepts and assigns same as error as being contrary to law, because under the law and under the undisputed evidence, said ruling and said judgment is based upon an erroneous measure of damages for the reason that Radio Station WGST could not legally function without a license from the Federal Communications Commission, and the Federal Communications Commission by its order of November 9, 1945, denied the application of the defendant for a renewal of the license because of the existence of the contract of April 15, 1943. Operation of the Station thereafter, with the contract in force, would have been illegal. Without the operation of the station, the contract had no monetary value, being predicated solely upon 15% net billings from [fol. 144] the operation of the station. Under the law there can no- be greater recovery for a breach of contract than there would have been had there been no breach. Had there been no breach of contract, the radio station could not legally have operated from November 9, 1945, to the date of said trial.

6. To said order, judgment and decree as a whole, defendant, Regents of the University System of Georgia, then

and there excepted as being contrary to law, and now excepts and assigns the same as error as being contrary to law.

Defendant, Regents of the University System of Georgia, comes now, within the time provided by law, and files this its exceptions pendente lite to each and all of the judgments and rulings hereinabove set out, and pray that the same be certified as true, and ordered filed on the record in said cause.

This 24th day of October, 1947.

Eugene Cook, Attorney General of Georgia. Hamilton Lokey, Special Deputy Assistant Attorney General of Georgia. Margaret Hartson, Attorney.

201 State Capitol, Atlanta 3, Georgia.

[fol. 145] CERTIFICATE

The above and foregoing bill of exceptions pendente lite is hereby allowed and certified to be true. Let the same, with this certificate, be placed upon the record.

This 24th day of October, 1947.

Bond Almand, Judge Superior Court of Fulton County (Atlanta Circuit).

Filed in Office, this the 24 day of Oct. 1947. D. W. Brown, Deputy Clerk.

IN SUPERIOR COURT OF FULTON COUNTY.

Number A-937
Fulton Superior Court

W. E. CARROLL et al.,

vs.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

JUDGMENT—October 10, 1947

The above stated case having come on for trial and, by consent of the parties, the same having been tried before the court without the intervention of a jury on all issues of fact and law, and the court having made and filed, as a part

of the record, findings and conclusions: It is thereupon ordered, adjudged and decreed that the plaintiffs, W. E. Carroll, Clarence H. Calhoun, Mrs. Hattie J. Pickard, Mrs. Emma B. Moore and Sam Pickard, Trustee for Sam Pickard, Jr., do recover of the defendant, Regents of the University System of Georgia, the sum of $144,968.63 principal, the same being the amount due, under the findings of the [fols. 146-148] court, as principal up to and including the month of August, 1947; that the said plaintiffs do recover of said defendant the further sum of $10,991.31 as interest on said principal sum to the date of this judgment; that the said plaintiffs do recover of the said defendant future interest on the principal sum of $144,968.63 at the rate of 7 per cent per annum to the time of payment and satisfaction of this judgment.

The recovery hereinabove provided for is for the amounts adjudged to be due as principal up to September 1, 1947 with the accrued interest thereon up to date of this judgment.

It is further ordered that the plaintiffs do recover of said defendant the sum of $—— as cost for the use of the officers of the court. This judgment is superseaded for 20 days.

This 10th day of October, 1947.

Bond Almand, Judge Superior Court, Atlanta Circuit.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 149] IN SUPREME COURT OF GEORGIA

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA et al.

v.

CARROLL et al.

OPINION—Decided February 10, 1948

By the Court:

JENKINS, Chief Justice:

The instant case, although an action for damages resulting from breach of contract, was brought in equity by reason of prayers for an accounting and other equitable relief incidental to recovery designed to avoid a circuity of actions. The issues were tried upon the pleadings, stipulated facts, and certain documentary evidence without the intervention of a jury. The defendants admitted entering into the contract sued on, which called for the payment to plaintiffs of 15 per cent of the "net billings" received from the operation of radio station WGST for a specified period of time; and the defendants further admitted the breach of said contract, but set up by way of defense to the claim of damages certain undisputed facts to show that continued performance of such contract became impossible by reason of the action of the Federal Communications Commission in ruling that such contract was contrary to the public interest, and thereupon requiring the defendants to disaffirm said contract as a prerequisite to granting a renewal license to operate said radio station. Damages were awarded the plaintiffs as prayed in an amount represented by 15 per cent of the net billings of said station from the date of the breach of the contract up until the time the suit was instituted. [fol. 150] Exceptions are to the preliminary findings of law and fact as made by the trial court and to the final judgment entered thereon. Held:

1. "The mere necessity for an accounting to ascertain the amount due on a contract is insufficient to give equity jurisdiction to order an accounting." Burress v. Montgomery, 148 Ga. 548 (5); Martin v. Home Owners Loan Corp., 198 Ga. 288, 290. Nor is it made to appear in the instant case that the accounts are complicated and intricate, within con-

templation of the provisions of the Code, § 37-301, such as might make this case one of equitable jurisdiction. Furthermore, it appears that the accounting prayed by the plaintiffs was not complicated, but was furnished by the defendants as a part of their answer, and the accounting as thus rendered has been accepted as the basis for determining the amount of the judgment rendered by the trial court, and no exception is taken relating to the correctness of said accounting.

(a) The judgment of the lower court directing that the amount of recovery be paid directly to the plaintiffs, instead of to their agents, as contemplated under the terms of the contract sued on, which provision of the judgment is not excepted to by any of the parties including the agents who were made parties to the suit, effectively eliminates from the case any equitable feature which may have existed because of any necessity to avoid a multiplicity of suits or a circuity of action.

(b) While it is contended in the brief of counsel for the defendants, now plaintiffs in error, that the facts relied upon as a defense to the action for damages present a case [fol. 151] "for the application of the doctrine of equitable rescission," yet even though this be assumed, the defendants in their answer do not ask for rescission or pray for any *affirmative* equitable or legal relief in the enforcement of an equitable right, but to the contrary the answer, after setting forth that the defendants were no longer permitted to comply with their contract, merely prays that they "be dismissed hence and with [their] reasonable costs." In this connection, an action not otherwise equitable is not made so by a plea setting up purely defensive matter of an equitable nature, in the absence of prayers for some affirmative equitable remedy. This is true even though such answer might call for the application of equitable principles. Hecht v. Snook & Austin Furniture Co., 114 Ga. 921, 927; House v. Oliver, 123 Ga. 784, 785; Burnett v. Davis & Co., 124 Ga. 541, 544. Since whatever equitable features the case may originally have contained have been eliminated by a judgment of the lower court which is not excepted to *a fortiori* such purely defensive matter as is set up by way of defense in the instant case, without invoking an affirmative remedy in the enforcement of an equitable right, would not give

this court jurisdiction of the writ of error. Accordingly, the Court of Appeals and not this court has jurisdiction of the writ of error, and it is ordered, therefore, that the case be transferred to the Court of Appeals, without intimating thereby any opinion as to the rights of the defendants at law; the ruling in transferring this case merely being that, since no prayers for any affirmative equitable remedy are made, a court at law is the proper tribunal to determine [fol. 152] what rights the defendants might have under their plea, even though they may call for the application of equitable principles.

Transferred to the Court of Appeals. All the Justices concur, except Bell, J., absent on account of illness; Head, J., disqualified; and Wyatt, J., who took no part in the consideration or decision of this case.

[fol. 153] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 154] In Supreme Court of Georgia

16066

Order Transferring Cause to Court of Appeals—February 10, 1948

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered: Regents of the University System of Georgia et al. v. W. E. Carroll et al.

This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the case be transferred to the Court of Appeals, that Court and not the Supreme Court having jurisdiction thereof. All the Justices concur, except Bell, J., absent on account of illness, Head, J., disqualified, and Wyatt, J., who took no part in the consideration or decision of this case.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

Feb. 27, 1948.

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

K. C. Bleckley, Clerk. (Seal.)

[fol. 155] IN THE COURT OF APPEALS OF GEORGIA

31999

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, et al.

v.

CARROLL et al.

OPINION—October 27, 1948

By the Court:

1. Radio broadcasting is an instrumentality of interstate commerce and subject to regulation under the provisions of the commerce clause of the United States Constitution.

2. The Federal Communications Commission is an administrative agency of the Federal Government, empowered to enforce the provisions of the Communications Act of 1934 (47 U. S. C. A. Sec. 151, et seq.), and has the power and authority to grant or refuse licenses to radio-broadcasting stations, with a view to subserving the public interest so that the people shall have the best possible radio service; but nothing in the power granted to the commission, or in said communications act of Congress, gives to the commission the power and authority to regulate the private contracts and business of those operating radio-broadcasting stations, where the same is not necessary in the protection of the public interest, and where such contracts do not affect the interstate transactions of the radio station.

GARDNER, J.:

W. E. Carroll, Clarence H. Calhoun, Mrs. Hattie J. Pickard, Mrs. Emma B. Moore, and Sam Pickard, trustee for Sam

Pickard, Jr., brought suit in Fulton Superior Court against the Regents of the University System of Georgia and Fulton National Bank to recover damages caused by an alleged breach of contract by the regents. It was alleged that the [fol. 156] radio station W. G. S. T. is held and owned by the regents in trust for the Georgia School of Technology, and that the contract sued on was made by the regents with the plaintiffs for and on behalf of said Georgia School of Technology. The petition further alleged: that under the contract sued on it appeared that the regents purchased from the plaintiffs, who were the stockholders of Southern Broadcasting Stations Inc., the capital stock therein owned and held by them, agreeing to pay the plaintiffs therefor "a sum equal to 15 per cent of the net billings of Radio Station W. G. S. T., located in Fulton County, Georgia, of the sale of time on the air for any and all types of broadcasting, visual and sound, including any and all revenue which may be derived from such sources as a result of any new developments in the broadcasting field during the period for which the payments under said contract are to be made by said defendant"; that under the agreement such payments were to be made monthly to Fulton National Bank as agent, beginning April 15, 1943, and to January 6, 1950; that the regents paid this sum, to wit, 15 percent of said net billings of the radio station from April 15, 1943, to and including July, 1945; that no further sum has been paid by the regents under said contract after July, 1945; that under the contract each month since July, 1945, an amount, to wit, said 15 per cent of the billings of the station for that month, has become due the plaintiffs by the regents and has not been paid by them; and that there is now a large sum due the plaintiffs under the contract, which amount is unknown to them, and the ascertainment thereof requires [fol. 157] an inspection of the books of the radio station and an accounting. The plaintiffs prayed for judgment and an accounting to ascertain the amount due them under the contract. A copy of this contract was attached to the petition, and it was therein provided as set up in the petition. We might here state that on December 4, 1945, the regents filed the third application for license renewal. At the same time they filed an application for a construction permit. As an exhibit to both applications they filed a statement affirmatively showing that no further effect was being given

to the agreements condemned by the Federal Communications Commission. Thereafter, on March 7, 1946, the application was granted and the license renewal was issued. Since the issuance of that license there has been another renewal, on May 1, 1947, which runs until May 1, 1950. The radio station is being currently operated under this license.

In its answer to the said petition, Fulton National Bank admitted that it had been selected as the medium through which the regents were to make said payments to the plaintiffs. The bank had on hand a small sum left over from payments made to it by the regents, which it paid into court.

The regents admitted the allegations of the petition dealing with the subject-matter of the contract; and that no payments had been made thereunder to the plaintiffs since July, 1945. The regents set up in their answer the amount of the 15 per cent of the net billings of the radio station from July, 1945, to the date of the filing of the suit, thus obviating the necessity of an accounting to ascertain such sum. They did not contest the fairness of the contract [fol. 158] or its validity, except that they set up that, under the ruling of the Federal Communications Commission, the regents could not legally perform said contract and the non-performance thereof was excused, and the regents were not due the plaintiffs the sums sued for or any other amount under said contract that is, the regents contended that, under the rulings and findings of the Federal Communications Commission, it had become impossible to carry out the contract sued on, and therefore the regents are excused from a performance thereof. The commission contended that the contract whereby the Regents purchased the stock of the Southern Broadcasting Stations Inc. from the plaintiffs, and agreed to pay a certain percent of the net billings of the station for a specified number of months, was contrary to the public interest and inconsistent with the provisions of the Federal Communications Act (47 U. S. C. A. sec. 151 et seq.). The defense of the regents, therefore, is to the effect that they are excused as a matter of fact and of law from further performance of this contract by reason of the impossibility of their performing the same because of an act of law.

The case was submitted to Honorable Bond Almand, one of the Judges of the Superior Court of Fulton County,

upon an agreed statement of facts and without the intervention of a jury, and judgment was rendered for the plaintiffs and against the regents, awarding damages for the 15 percent of the net billings of said radio station accruing from July, 1945, to the date of the present suit, and amounting to $144,968.63 principal and $10,991.31 as accrued interest. Judge Almand denied the contentions of [fol. 159] the defendant as to the legal impossibility of performing the contract sued on by reason of an act of law, and that the Regents were therefore excused from performance; and ruled that the Federal Communications Commission was without power to take any action which would have the effect of nullifying, changing, or in any wise modifying the duties and obligations of the parties to said contract thereunder, whereby the regents purchased the stock of said broadcasting company, agreeing to pay therefor 15 per cent of the net billings of the station or gross income thereof derived from the operation of said radio station; and also ruled that the action of the Federal Communications Commission, in denying a license renewal to the regents for the operation of radio station W. G. S. T., so long as the said contract remained in effect, would not excuse the regents from further performance of such contract on the ground of impossibility of performance by reason of an act of law.

It appears that the first application to the Federal Communications Commission for a renewal of the license for radio station W. G. S. T. was made in January, 1940, by the Georgia School of Technology, and that this application was denied. After conducting hearings, the commission found that the radio station, in July, 1923, was acquired by gift from Clark Howell, Sr., a trustee of the school; that a contract had been made with Southern Broadcasting Company, predecessor of Southern Broadcasting Stations, Inc., to operate the station, the latter to receive the major portion of the income derived from the operation of the station; that thereafter Southern Broadcasting Stations, Inc., which [fol. 160] had succeeded to the rights of Southern Broadcasting Company, agreed to operate this station under the same contract; that in 1933 the board of trustees of the school was abolished, and the Regents of the University System of Georgia, an agency of the State of Georgia, was established by the State legislature; that an agreement was

entered into on June 18, 1936, between the regents, acting for the Georgia School of Technology and said radio station, and Southern Broadcasting Stations, Inc., extending the previous contract and undertaking to continue the operation of the station, and thereunder maintaining, in effect, control of such station and receiving the greater portion of the proceeds derived from the operation of said radio station; and that on March 23, 1943, the application for a renewal of the license was denied, with the right of the applicant to renew same "provided the commission is given assurance that the applicant is prepared to and will in fact assume and discharge the full responsibilities of a licensee." Southern Broadcasting Stations, Inc., intervened in the foregoing application and the subsequent proceedings thereunder, and such application and proceedings were designated in the office of said commission as File No. 5903.

Thereafter, in May, 1943, another application for renewal of license was filed by the regents on behalf of said radio station. Neither the broadcasting corporation nor the stockholders or former stockholders thereof intervened in these proceedings, which were known as File No. 6534, but they had actual knowledge of the same being filed and of the subsequent proceedings had therein, including the findings of the commission and the order and judgment thereon. Since [fol. 161] the findings of the commission on the first application and the terms on which the applicant was given the privilege of making another application for renewal of the license within a designated period, it appears that the applicant (the regents) had, under the contract of April 15, 1943, and by means thereof, purchased the entire stock of said Southern Broadcasting Stations, Inc. This application set out that the regents, or a committee appointed to act for the regents, had supervision, direction, and control of the operation of this radio station. Thereafter, pending this application, the applicant filed a petition for the grant of such license without a hearing, setting up therein that under the contract of April 15, 1943, the right to control the operation of the radio station was in the regents on behalf of the school, and asking for a renewal of the license. It was shown that the income of the station had increased in 1943 from 1942 and previous years. It was stated therein that "all connection between said station and all former officers, directors, and stockholders of the Southern Broadcasting Stations, Inc.," had been severed. This petition was denied

by the commission. Thereafter the application for renewal of the license of Radio Station W. G. S. T. was likewise denied, it being found and determined by the commission that the arrangement under the contract of April 15, 1943, would jeopardize the operation of the radio station financially, and the public interest would not be served, and also the assumption by the applicant of a burden, amounting to 15 percent of its gross income resulting not only from the operation of the station but from all new broadcasting developments, would have the effect of restraining the [fol. 162] licensee from entering the field of FM and television broadcasting, and such restraint does not appear to be in the public interest, and that such payments represent an effort on the part of the parties to the contract to give further effect to the agreement by which control of the radio station had been illegally transferred to Southern Broadcasting Stations, Inc., which would not be in the interest of the public, since it would, in effect, thwart the efforts of the commission to enforce the Communications Act, and that therefore the grant of this application for a renewal of the license would not serve the public interest, convenience, or necessity, and the application was denied, but it was provided in the order that another application could be filed within 90 days, "provided it is affirmatively shown that no further effect is given to the" contract sued on, which the commission had found to be incompatible with the operation of Radio Station W. G. S. T. in the public interest. The regents assert that the trial judge erred in rendering judgment for the plaintiffs. Error is assigned on the findings and rulings of the trial court and on the final judgment for the plaintiffs and awarding damages to them for the alleged breach by the regents of said contract of April 15, 1943, on the grounds, among others, that the court erred in holding that the Federal Communications Commission was without power to take any action in the premises which would have the effect of nullifying, changing, or in any wise affecting or modifying the terms and provisions of the contract of April 15, 1943, or of the duties and obligations of [fol. 163] the parties thereunder, and also erred in ruling and holding to the effect that the action of the commission, in denying a license renewal to the regents, so long as said April 15, 1943, contract remained in effect and was recognized by the regents as binding on them, should not conclusively afford to the regents a legal excuse from further

performance of this contract by reason of the impossibility on the part of the regents to perform the same and to carry out the provisions thereof by reason of an act of law.

A bill of exceptions was sued out by the regents directly to the Supreme Court, the suit having been brought by the plaintiffs in equity by reason of certain prayers for equitable relief. The Supreme Court transferred the writ of error to the Court of Appeals, holding that, since no prayers for affirmative equitable remedies were made, a court of law was the proper tribunal to determine what rights, if any, the defendants might have under their plea, even though they may call for the application of equitable principles. Regents of the University System v. Carroll, 203 Ga. 292 (46 S. E. 2d, 496).

[fol. 164] It is contended that the proper interpretation and correct application of the Federal Communications Act of 1934 (47 U. S. C. A. 151 et seq.) requires a different judgment from that rendered. Under this statute of Congress, the Federal Communications Commission was created and clothed with the power and authority to enforce the provisions of said law.

The radio broadcasting licensing system established by this act is a proper exercise by Congress of the power to regulate commerce. National Broadcasting Co. v. U. S., 319 U. S. 190 (63 Sup. Ct. 997, 87 L. ed. 1344). The standard provided by this law for the licensing of radio broadcasting stations is public interest, convenience or necessity. Id. The underlying policy of the communications act and of the Federal Communications Commission is to protect the public interest. The commission is an administrative agency set up by Congress to determine pursuant to this law the rights of the people to have the best possible radio service. See Scripps-Howard Radio v. F. C. C., 316 U. S. 4; (62 Sup. Ct. 875, 86 L. ed. 1229). Regents of N. M. College of Agriculture v. Albuquerque Broadcasting Co., 158 Fed. 2d, 900; Yankee Network v. F. C. C., 107 Fed. 2d, 212; Black River Broadcasts v. McNinch, 101 Fed. 2d, 235. But the arbitrary action of the commission in the exercise of its regulatory power is controlled under said act. See Yankee Network v. F. C. C., 107 Fed. 2d, 212.

The Federal Communications Commission has power in the "public interest" under said act to refuse licenses to stations which engage in practices contrary to the public

interest, convenience, or necessity. In each case that comes before it, the commission must exercise ultimate [fol. 165] judgment whether the grant of a license in the particular instance would serve the public interest, convenience or necessity. See National Broadcasting Co. v. U. S., 319 U. S. 190 (supra). A radio-broadcasting station is an instrumentality of interstate commerce. City of Atlanta v. Southern Broadcasting Co., 184 Ga. 9 (190 S. E. 594). This is so of necessity, as the signals of a weak radio station may carry beyond the limits of the State in which the station may be located. Under the commerce clause of the United States Constitution (par. 3, sec. 8, art. 1), Congress is given power "to regulate Commerce, among the several States." Code, § 1-125. Radio broadcasting "or communications" are all interestate. This is so, although such broadcasting may be intended for intrastate transmission only. Such communications admit of and require a uniform regulation and control throughout the United States. City of Atlanta v. Southern Broadcasting Co., supra.

The Federal Communications Commission has the power and authority in granting a license to a radio station to see that the public interest and convenience are subserved thereby, and an important element of public interest and convenience affecting the issue of a radio-broadcasting license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. The commission must see to it that all applicants for radio-station licenses have the necessary technical ability to broadcast programs, and that the stations are properly constructed and properly and adequately manned and do not interfere with other stations, and that all licensees are responsible, morally and financially. National [fol. 166] Broadcasting Company v. U. S., 319 U. S. 190 (supra.)

However, the Communications Act was not intended to place matters of a private nature before the Federal Communications Commission. Southern Broadcasting Co. v. Carlson, 187 La. 823 (175 So. 587). In Johnson v. Radio Station W.O.W., 144 Neb. 406 (14 N. W. 2d, 556), 326 U. S. 120 (65 Sup. Ct. 1475, 89 L. ed. 2092), it was held that the right of the Federal Communications Commission to license and require compliance with regulations of the commission does not deprive the State courts of jurisdiction

to hear and decide all other property rights in a radio station and the rights of the parties incident thereto. In Southern Broadcasting Corp. v. Carlson, supra, the court held that the State court had jurisdiction of a broadcasting company's suit for damages for breach of contract for the management of a radio-broadcasting studio licensed to the defendant, and for injunction to prevent further breach, as against the contention that the dispute should be settled by the Federal Communications Commission under the Communications act of 1934.

Under the provisions of the communications act as amended, it does not appear to have been the intention of Congress "to regulate the business of the licensee" radio-station operator, and such statute does not, properly construed, make any attempt to do so. "The commission is given no supervisory control of the programs, of business management, or of policy" of the radio-broadcasting stations licensed by such commission or of the operators thereof. Federal Communications Comm. v. Sanders Bros., [fol. 167] 309 U. S. 470, 475 (60 Sup. Ct. 693, 84 L. ed. 869). While radio broadcasting is truly an interstate proposition, and the operator of a radio-broadcasting station is the operator of a public utility, and thus subject to regulation as any other public utility engaged in interstate transactions would be under the authority given Congress by the commerce clause of the Federal Constitution, its private transactions, not affected with a public interest and not connected with its operation as an interstate public utility, are not subject to regulation and control by the Federal Communications Commission or under the provisions of the communications act of 1934, as amended, or any other governmental agency empowered to regulate interstate transactions of a public utility. Matters of private concern, and contracts affecting such rights, which do not have as their subject-matter the rights conferred by a license, or do not substantially affect such rights, are not within the scope of the commission's power to regulate and control in the public interest broadcasting by radio stations and licenses to such stations. Thus, the Federal Communications Commission "has held that contracts for the sale of broad-casting facilities," which "do not involve the transfer of the license itself or rights conferred by it, are matters of private concern and do not require the commission's consent or approval." See In re M. A. Lee, 5 F. C. C.

364; In re Heart's Radio Inc., 7 F. C. C. 292, and In re City of Atlantic City, 7 F. C. C. 485.

Counsel for the regents have not cited this court to any provision of law giving to the commission the power to [fol. 168] regulate the private affairs of the regents to the extent of abrogating an otherwise valid contract made by the regents with the stockholders of Southern Broadcasting Stations Inc., whereby the former purchased the stock of the latter and agreed to pay therefor a certain percent of the net billings of the radio station until 1950. It was not shown that this contract was illegal under the law for any reason. It does not appear that the subject-matter of the contract was affected with such a public interest as to justify the same to be nullified by the order of a governmental agency, charged by act of Congress under the authority of the commerce clause of the Constitution with the power to license radio-broadcasting stations, and to regulate their interstate transactions, namely the broadcasting of radio programs, to the extent of protecting the public interest in the ability of the station to broadcast for the public convenience and necessity. The effect of the contentions of the regents is to give to the commission such power. The regents contend that the refusal of the commission to grant a license renewal to them so long as the regents recognized this contract necessarily and as a matter of law excused them from carrying out the private obligation and contract made with the plaintiffs, whereby the regents purchased the stock in said Southern Broadcasting Stations Inc. from the plaintiff stockholders, and acquired all of the corporation's physical assets as well as its intangible properties and assets, and had agreed to pay therefor an amount of the gross income received by the radio station for a stipulated time, and in the performance of which it had acquired the stock and interest of the [fol. 169] plaintiffs in the corporate property, and had surrendered in Fulton Superior Court the charter of the corporation so that same now no longer exists. We cannot agree with this contention of the regents, and are of the opinion that the trial court correctly held that the defense of the regents, as set forth in their answer and amendment thereto, did not excuse them from performing this contract, otherwise deemed fair and valid, and awarding damages to the plaintiffs to the extent of 15 percent of the net billings actually received by the regents from the operation of this

radio station from August 1, 1945, to the date of filing this suit.

It is well to note that it appeared without dispute that the regents, being a State governmental agency, have been relieved from the payment of certain taxes, including income taxes, and that this amounts to an increase in the income received by the station from its operation in excess or equal to the 15 percent of the net billings derived by the regents from the operation of the radio station, the agreed purchase-price to be paid for the control of this radio station, and for the corporate stock of said broadcasting corporation and its physical and intangible assets and property. It cannot be anticipated that the contract sued on, insofar as it related to the payment of the agreed purchase-price of this stock and of the assets of the corporation, giving to the regents complete control of the radio station and its operation, would so far affect the financial ability of the radio station as to render the station unable to operate in the public interest. The evidence fails to show that the contract would affect the public interest in reference to the [fol. 170] broadcasts of this station.

The plaintiffs are not collaterally attacking the order and decision of the Federal Communications Commission by petition in Fulton Superior Court. They are simply seeking to enforce a private agreement by suit for a breach thereof. The defendants set up the order and decision of said commission as excusing them from performance of this contract, and contend that such order and decision nullified said contract, and that the plaintiffs are bound by such order and decision. With this contention we do not agree. To give to the communications act of 1934 (47 U.S.C.A. sec. 151 et seq.) the construction contended for by the regents, by holding that the commission had the right and power under said act to abrogate a private contract between a radio-station operator and the stockholders of a defunct corporation whereby the radio station operator acquired all the corporate assets, physical and intangible, and all stock held by the stockholders, agreeing to pay therefor an amount of the proceeds derived from the operation of the radio station for a stipulated time,—it not appearing that the payment of such purchase-price would render the radio station unable to operate in the public interest—would ascribe to Congress an unconstitutional attempt to regu-

late private business and contracts, not affected with a public interest, and not necessary for the public interest, convenience, or necessity.

This decision is not intended to be an adjudication that the regents would be liable to the plaintiff stockholders under the contract of April 15, 1943, for the payment of the purchase-money for said stock, in the event that the regents [fol. 171] are definitely refused a license by the commission because of a recognition by the regents of the contract now sued on except to the extent of paying over to the plaintiffs 15 percent of the net billings of the radio station during the months it has been and is operated under license from the commission, temporary or permanent, and derives an income from its operation. What we hold, and nothing more, is that, under the pleadings and agreed facts, the trial judge correctly found that there had been an unexcused breach by the regents of the contract of April 15, 1943, and that the regents were liable to the plaintiffs under said contract for such breach for the 15 percent of the net billings received from the operation of said radio station from August 1, 1945, to the filing of this suit, or as found by the trial court, for damages of $144,968.63 principal, and $10,991.31 accrued interest being 15 percent of the net billings during such time.

Taking the above view, the other contentions of the regents are necessarily to be determined adversely to the regents and are controlled thereby, and the trial judge's ruling and judgment excepted to were not erroneous for any of the reasons assigned.

Judgment affirmed. Sutton C.J., and MacIntyre, P.J., concur.

Decided Oct. 27, 1948.

[fol. 172] In the Court of Appeals of Georgia

31999

Judgment—October 27, 1948

The Honorable Court of Appeals met pursuant to adjournment.

The following judgment was rendered: Regents of the University System of Georgia et al. v. W. E. Carroll et al.

This case came before this court upon a writ of error from the Superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

Sutton, C. J., MacIntyre, P. J., and Gardner, J., concur.

Sutton, C. J., was designated to preside in place of Townsend, J., disqualified.

[fol. 173] IN THE COURT OF APPEALS OF GEORGIA

[Title omitted]

MOTION FOR REHEARING—Filed November 5, 1948

Now comes Regents of the University System of Georgia, within the same term and within ten days of the rendition of the decision in this case adverse to it, and before the remittitur has been forwarded to the Clerk of the lower court, and files this its motion for rehearing requesting the court to vacate its former judgment and enter judgment for movant upon the following grounds:

1. In that portion of the court's decision embodied in Headnote 2, wherein the court said:

". . . but nothing in the power granted to the Commission (Federal Communications Commission) nor in said communications act of Congress (Communications Act of 1934, 47 USCA Sec. 151, et seq.) gives to the commission the power or authority to regulate the private contracts and business of those operating radio broadcasting stations, *where same is not necessary in the protection of the public interest, and where such contracts do not affect the interstate transactions of the radio station*" (Emphasis and parentheses supplied), the Court overlooked or misapplied the following material facts in the record, the effect of which requires a judgment different from that rendered by the Court, to-wit:

[fol. 174] (a) It was stipulated that the plaintiffs in this action, who were parties to the contract of April 15, 1943 (the contract here sued upon) knew that under the Communications Act of 1934 the Federal Communications Commission had jurisdiction over any contract or agreement

affecting the operation of a radio station in the public interest or affecting the present or future financial ability of a radio station to operate in the public interest (Record, pages 86 and 87).

(b) The Federal Communications Commission, in connection with the second application of the Regents for a license to operate Radio Station WGST, after a full and exhaustive hearing, determined that the contract of April 15, 1943 directly and adversely affected the ability of the station to function in the public interest, and placed such financial burdens upon the station that it could not properly function in the public interest with the contract in effect, and that the future operation of the station in the public interest was seriously jeopardized. The decision of the commission was in the following clear language (Record, page 60):

"In view of the foregoing, the commission concludes that the arrangements under the contract of April 15, 1943, would jeopardize the licensee's financial ability to conduct the future operation of the station in the public interest and that, therefore, public interest, convenience or necessity would not be served by a grant of the instant application."

(c) The Federal Communications Commission further found the contract to be adverse to the public interest in [fol. 175] that its burdens would hamper the station in its expansion into the fields of FM and Television Broadcasting (Record, page 60).

(d) The Federal Communications Commission further found that the contract was adverse to the public interest in that it was an effort to condone a previous illegal arrangement condemned by the commission and tended to thwart the commission in its enforcement of the Communications Act of 1934. (Record, page 61).

(e) The Federal Communications Commission found it necessary, in the protection of the public interest, to *deny* the application for license renewal for Station WGST, so long as the contract of April 15, 1943 was in effect. (Record, pages 61 and 63).

The commission having specifically found that the contract of April 15, 1943 adversely affected the ability of the radio station to function in the public interest, it begs the question to rule in regard to a contract which does not af-

fect the public interest and the decision in this case is not adapted to the controlling facts as they appear in this record.

2. In the body of the court's opinion, (page 15) where the court said:

"It does not appear that the subject matter of the contract was affected with such a public interest as to justify the same to be nullified by the order of a governmental agency, charged by act of Congress under the authority of the Commerce Clause of the Constitution with the power to license radio broadcasting stations and to regulate their interstate transactions, . . ." and at page 17, where the Court said:

[fol. 176] "It cannot be anticipated that the contract sued on, insofar as it related to the payment of the agreed purchase price of this stock and of the assets of the corporation, giving to the Regents complete control of the station and its operation, would so far affect the financial ability of the radio station as to render the radio station unable to operate in the public interest. The evidence fails to show that contract would affect the public interest in reference to the broadcasts of this station," and at page 18, where the Court said:

". . . it not appearing that the payment of such purchase price would render the radio station unable to operate in the public interest . . ."

the court overlooked or misapplied the following material facts in the record, and the following statutes and decisions, controlling as authority upon this Court:

(a) The Federal Communications Commission, by its decisions of September 19, 1945 (Record, pages 56 to 61) and November 9, 1945 (Record, page 63) reached exactly the opposite conclusion.

(b) The Federal Communications Commission, under the Communications Act of 1934, is the only proper agency to determine whether the contract of April 15, 1943 does or does not affect the ability of Radio Station WGST to properly function in the public interest.

The basic law which confers jurisdiction in such matters upon the Federal Communications Commission is the

Communications Act of 1934 (47 USCA, Sec. 151, et seq.) Apparently the Court has overlooked or has erroneously construed and misapplied the provisions of this statute, especially sections 301, 307 (a), 308(b), 309(a) and 310(b). [fol. 177] In connection with the proper construction of the Communications Act of 1934, upon the question of the commission being the only proper agency to determine such matters, the Court has overlooked a controlling authority, to-wit: Black River Valley Broadcasts v. McNinch, et al., 101 Fed. (2) 235, wherein the Court of Appeals for the District of Columbia at page 237 of its opinion, ruled:

"The Commission is an administrative agency set up by Congress to determine under statutory direction the rights of the people of the United States to have the best possible radio service. The interest, convenience, and necessity of the public is an essential test for the privilege of operating a radio station. This determination is, by the Act of 1934, lodged in the Commission. It is the only proper agency to decide these public questions, and its findings, under the law, must be maintained if they are not arbitrary or capricious, or erroneous in law, and are based upon substantial evidence."

(c) The Federal Communications Commission having made its determination after a full and exhaustive hearing of all the facts, such determination is binding unless reversed on appeal as provided by statute, and neither this court nor the Fulton Superior Court has power or authority to substitute its determination for that of the commission as to whether the contract does or does not affect the ability of the radio station to function in the public interest.

Upon this point the court has overlooked or erroneously construed or misapplied the following controlling authorities, which are binding upon this Court:

[fol. 178] Black River Valley Broadcasts vs. McNinch, et al., 101 Fed. (2) 235; Yankee Networks vs. FCC 107 Fed. (2) 212 at 216; Atchison, Topeka & Santa Fe Ry. vs. Scarlett, 300 U. S. 471.

In the Yankee Network case the following controlling proposition is found, at page 226 of the decision:

"Moreover, we are unable to accept appellants contention that the findings of the commission are arbitrary and capricious. It is true that the evidence is susceptible of other conclusions than those drawn from it by the Commis-

sion; but that is not determinative. Neither is it material that this court might have arrived at other conclusions. As was recently said by the Supreme Court in Rochester Telephone Corp. vs. United States, 307 U. S. 125, 145, 146, 59 S. Ct. 754, 765, 83 L. Ed. 1147; *'So long as there is warrant in the record for the judgment of the expert body it must stand'.''* (Emphasis supplied).

In the Scarlett case, the Supreme Court of the United States expresses the controlling principle of law as follows, (page 474):

"The regulation having been made by the commission in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute. And the railway company having strictly complied with the regulation has discharged its full duty so far as the ladder requirement of the Safety Appliance Act is concerned. *The judgment of the trial court and jury cannot be substituted for that of the commission.*" (Emphasis supplied).

3. In the body of the Court's opinion (page 19) where the court said:

"What we hold, and nothing more, is that under the pleadings and agreed facts, the trial judge correctly found that [fol. 179] there had been an unexcused breach by the Regents of the contract of April 15, 1943, and that the Regents were liable to the plaintiffs under said contract for such breach for the 15 per cent of the net billings received from the operation of said radio station from August 1, 1945 to the filing of this suit . . ." the court has overlooked, erroneously construed or misapplied the following material facts in the record, and the following decisions, controlling as authority upon this court:

(a) It was stipulated that without a license from the Federal Communications Commission the Regents could not have legally operated the radio station (Record, page 81).

(b) It was stipulated that this fact was known to the parties when they made the contract of April 15, 1943, and that they further knew the operation of the radio station was subject to Federal regulation and control under the Communications Act of 1934, as administered by the Federal Communications Commission. (Record, pages 86 and 87).

(c) The contract was executed in contemplation of its approval by the Federal Communications Commission. In this connection the Court appears to have overlooked the controlling decision of the Supreme Court of Georgia in Federal Land Bank vs. Shingler, 174 Ga. 352, wherein the Court said, at page 361:

"However, it is an established principle that parties dealing upon a subject controlled by a Federal law are presumed to intend to contract with reference to the provisions of that law. Especially would this be true in Georgia, [fol. 180] under the Civil Code (1910), Par. 1, which provides: "The laws of general operation in this State are— 1. As the supreme law: The Constitution of the United States, the laws of the United States in pursuance thereof," etc., wherein Federal laws are given preference and priority over the laws of the state which may conflict with the federal legislation."

(d) The decision of the Federal Communications Commission denying the Regent's application for license renewal so long as effect were given to the contract of April 15, 1943, gave the Regents these alternatives:

1. Recognize the contract and go out of business, whereby the Regents would lose a very valuable property and the plaintiffs would get nothing (15% of nothing equals nothing), or

2. Disaffirm the contract and obtain the license necessary to stay in business.

The Regents chose the latter. The decision of this court forces the Regents to the former. It in effect orders the radio station to go out of business, since its license is predicated upon a disaffirmance of the contract and the station has never been authorized to operate with the contract in force. The decision of this Court has the further effect of rendering the operation of the station from August 1945 to date unlawful, since the commission found that operation of the station with the contract in force was contrary to the public interest, and the license was denied unless the contract was disaffirmed. This is a clear case for the application of the rule that impossibility of performance is an excuse for non-performance.

[fol. 181] In this connection we submit that the Court has overlooked and failed to give effect to the controlling

decision of the Supreme Court of Georgia in the case of The Macon and Birmingham Railroad Company vs. Gibson, 85 Ga. 1, wherein Judge Bleckley, at page 17 said:

"Nor is the right of the State so to amend or modify the charter abridged or in any manner affected by executory contracts entered into by the company with third persons before the amending act was passed. The Macon Construction Company, in dealing with the railroad company, was bound to take notice of the general law of the State, under which the right and power were reserved which have been exercised. So a corporation in the possession of franchises held at the will of the State cannot hinder the resumption or modification of those franchises by entering into executory contracts with third persons. Nor can that effect be wrought by like contracts between the parties immediately contracting with the corporation and sub-contractors under them. *On no contract whatsoever does the amendment now in question have any direct effect. Its only effect upon contracts is incidental, and if they cannot be performed consistently with the alteration in the charter made by the amending statute, their performance, insofar as thus hindered or obstructed, will be excused, the rule of law being that performance of contracts when rendered impossible by act of law stands excused.*" (Emphasis ours).

(e) The court, in finding that the plaintiffs were entitled to 15 per cent of the gross income of the radio station from August 1, 1945, until the filing of this suit, apparently has [fol. 182] overlooked the material fact in the record that the Regents had no right to a license if it gave effect to the contract. This is not a case where the Regents could legally operate the radio station whether it recognized the contract or breached it. Only by disaffirmance could it legally operate. Such being the case, if the station could not legally operate, it could have no net billings from sale of time on the air, and 15% of nothing equals nothing. Thus if the Regents had not breached the contract, plaintiffs would have received nothing under the contract. There is no authority under Georgia law to give more for a breach than a party would have received for performance of a contract.

The Court has doubtless overlooked the controlling decision upon the subject of the measure of damages in

Georgia, Lastinger v. City of Adel, 69 Ga. App. 535 at 536, where it said:

"An injured party cannot be placed in a better position than he would have been in if the contract had not been breached."

6. In the body of the court's opinion, at page 11, where the court said:

"However, the Communications Act was not intended to place matters of a private nature before the Federal Communications Commission. Southern Broadcasting Co. v. Carlson, 187 La. 823, 175 So. 587."

the Court has apparently erroneously construed or misapplied the Carlson case. In that case there was no holding that the management contract was a private matter not properly to be brought before the Commission. The trial court had concluded that the Commission alone had [fol. 183] jurisdiction over the matter and dismissed the suit. The appellate court reversed the trial court on the theory that *in the absence of action in the matter by the Commission,* the matter was properly triable on the merits in the Louisiana courts.

But this is not at all the case at bar. Here we have a contract which has been considered by the Commission and determined to adversely affect the ability of the radio station to function in the public interest. Under such circumstances there is no authority in the Fulton Superior Court or in this Court to substitute another determination as to the effect of the contract on the public interest. To do so is to collaterally attack and set aside the Commission's judgment, by whatever name it is called.

We submit that the basic error in the present decision of the Court stems from the determination by this court that the contract of April 15, 1943 does not affect the ability of the radio station to function in the public interest. This finding is in direct conflict with the determination of the Federal Communications Commission on that matter, which finding is conclusive in the case at bar. There can be no question but that the Commission, and not this Court, is the proper forum to decide that issue. The Commission having decided the issue, this court must follow that decision, otherwise it collaterally attacks the Commission's findings.

7. In affirming the ruling of the trial court that

"The Federal Radio Communications Commission was without power to take any action which would have the effect of nullifying, changing or in any wise modifying [fol. 184] the duties and obligations of the parties to said contract" (of April 15, 1943)

the Court has overlooked the following controlling authorities, binding upon this court, the effect of which will require a different judgment in this case:

Federal Radio Commission v. Nelson Bros. Bond and Mortgage Co. 289 U. S. 266, wherein the Supreme Court of the United States, held, at page 282:

"Those who operated broadcasting stations had no rights superior to this power of regulation. They necessarily made their investments and their contracts in the light of and subject to this paramount authority. This court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation in the hands of private individuals and withdraw from the control of Congress so much of the Field as they might choose by prophetic discernment to bring within the range of their enterprises."

and the case of Union Dry Goods Co. vs. Georgia Public Service Commission, 145 Ga. 658, affirmed unanimously by the Supreme Court of the United States at 284 U. S. 372, the Court saying at page 377:

"These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the State, and the judgment of the Supreme Court of Georgia must be

Affirmed."

[fol. 185] We submit that the present decision is wrong, and presents an irreconcilable conflict between this Court and the agency of Congress created to determine such matters. The decision should be withdrawn and a new decision rendered, based upon the proposition that the contract of

April 15, 1943 *does* affect the ability of the radio station to properly function in the public interest, and the Federal Communications Commission was authorized to predicate its grant of a license renewal upon the disaffirmance of the contract by the Regents. We respectfully submit that the authorities cited in our brief will then furnish a proper guide to a correct and sound decision as to the rights of the parties to this controversy.

We respectfully urge the court to grant this motion for rehearing.

Eugene Cook, the Attorney General. Hamilton Lokey, Deputy Assistant Attorney General of Georgia.

201 State Capitol, Atlanta, Georgia.

[fol. 186] CERTIFICATE OF COUNSEL

I, Hamilton Lokey, of counsel for movant, certify that upon a careful examination of the opinion rendered October 27, 1948 in the foregoing case, I am of the opinion that the material facts and controlling decisions set forth in this motion for rehearing were overlooked, erroneously construed or misapplied by the Court.

This 4th day of November, 1948.

Hamilton Lokey.

CERTIFICATE OF SERVICE

I, Hamilton Lokey, of counsel for movant, certify that I have this day mailed to James A. Branch, Esq. and Thomas B. Branch, Jr., Esq. of counsel for defendant in error, a copy of the within and foregoing motion for rehearing.

This 4th day of November, 1948.

Hamilton Lokey.

[File endorsement omitted.]

[fol. 187] IN THE COURT OF APPEALS OF GEORGIA

ORDER DENYING REHEARING—December 15, 1948

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed: Regents of the University System of Georgia et al. v. W. E. Carroll et al.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

[fol. 188] COURT OF APPEALS OF GEORGIA

No. 31999

[Title omitted]

NOTICE OF CERTIORARI—Filed December 17, 1948

To the Clerk of the Court of Appeals of Georgia:

You are hereby notified that it is the intention of Regents of the University System of Georgia, Plaintiff in Error, to apply to the Supreme Court of Georgia for a writ of certiorari to review the judgment of the Court of Appeals rendered and filed in the case above on October 27, 1948, in which a motion for rehearing was denied on December 15, 1948.

You are requested to prepare the record for use on certiorari.

This December 16, 1948.

Eugene Cook, Attorney General; Hamilton Lokey, Deputy Assistant Attorney General, Attorneys for plaintiff in error.

[File endorsement omitted.]

[fol. 189] SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

Case No. 16547

NOTICE OF APPLICATION FOR CERTIORARI—JANUARY 7, 1949

To the Clerk of the Court of Appeals of Georgia:

You are hereby notified that there has been filed in this office on this day an application to the Supreme Court for a writ of certiorari to the Court of Appeals in the case of Regents of the University System of Georgia v. W. E. Carroll et al.

Henry H. Cobb, Deputy Clerk Supreme Court of Georgia.

[File endorsement omitted.]

[fol. 190] SUPREME COURT OF GEORGIA

ORDER DENYING WRIT OF CERTIORARI—MARCH 16, 1949

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered: Regents of the University System of Georgia v. W. E. Carroll et al.

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur, except Bell, J., who dissents, and Head, J., disqualified.

[fol. 191] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 192] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 17, 1949

The petition herein for a writ of certiorari to the Court of Appeals of the State of Georgia is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
MAY 27 1949
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1948~~ 1949

No. ~~949~~ 83

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,

Petitioner,

vs.

W. E. CARROLL, CLARENCE H. CALHOUN, MRS. HATTIE J. PICKARD, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA AND BRIEF IN SUPPORT THEREOF.

EUGENE COOK,
Attorney General of Georgia;
HAMILTON LOKEY,
Deputy Asst. Attorney General of Georgia,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Jurisdiction	2
Questions presented	2
Material facts and proceedings before the Communications Commission and the courts below	4
The original situation	4
First proceedings before the Commission	5
The contract of April 15, 1943	6
Further proceedings before the Commission	6
The action taken by petitioner	8
The third application for license renewal	8
Proceedings in the trial court	9
The judgment and decree in the trial court	11
The decision of the Court of Appeals of Georgia	12
Reasons for granting the writ	13
Prayer for writ	15
Brief in support of petition	17
Opinions below	17
Jurisdiction	18
Statutes involved	20
Statement	20
Specifications of errors to be urged	20
Summary of argument	22
Argument	24
I	24
II	28
III	36
IV	38
V	40
VI	41
Conclusion	42
Appendix A	43

TABLE OF CASES CITED

	Page
Abie State Bank v. *Bryan*, 282 U. S. 765	19, 28
Armour and Co. v. *Alton Railroad Co.*, 312 U. S. 195	19
Atchison, Topeka & Santa Fe Ry. v. *Scarlett*, 300 U. S. 471	33, 38
Bacon v. *Texas*, 163 U. S. 207	24
Berg v. *Cincinnati, Newport & C. R. R. Co.*, 56 Fed. Supp. 842	34
Black River Valley Broadcasts, Inc. v. *McNinch*, 101 Fed. (2d) 235	32, 38
Citizens Bank v. *Opperman*, 249 U. S. 448	18, 24
Chicago, Burlington & Quincy Railway Co. v. *People of the State of Illinois ex rel.*, 200 U. S. 561	19, 27
Churchill Tabernacle v. *Federal Communications Comm'n*, 160 Fed. (2d) 244	29
Crescent City Live Stock Co. v. *Butcher's Union Slaughter-House*, 120 U. S. 141	26
Department of Banking v. *Pink*, 317 U. S. 264	18
DuBuque & Sioux City Railroad Co. v. *Richmond*, 15 Wall. 3	26
Enterprise Irrigation District v. *Farmers Mutual Canal Co.*, 243 U. S. 157	28
Federal Communications Commission v. *Sanders Bros.*, 309 U. S. 470	29
Federal Land Bank v. *Shingler*, 174 Ga. 352	36
Federal Radio Commission v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266	32, 39, 41
General American Tank Car Corp. v. *El Dorado Terminal Co.*, 308 U. S. 422	19
Glover v. *Mitchell*, 319 Mass. 1, 64 N. E. (2d) 648	35
Green Bay & Mississippi Canal Co. v. *Patten Paper Co.*, 172 U. S. 58	18, 27
Gregory v. *McVeigh*, 23 Wall. 294	18, 24
Hagens v. *United Fruit Co.*, 135 Fed. (2d) 842	34
Hall Neilson v. *Wilson Lagow*, 7 How. 772	26
Harris v. *Central Nebraska Public Power & Irrigation District*, 29 Fed. Supp. 425	34, 37
Hussman v. *Durham*, 165 U. S. 144	25
Ingraham v. *Union Stockyards Co.*, 64 Fed. (2d) 390	34
L. & N. R. R. Co. v. *Mottley*, 219 U. S. 467	40, 41

Page

Manufacturers Ry. Co. v. *United States*, 246 U. S. 457 34
Mississippi Valley Barge Line Co. v. *United States*, 292 U. S. 282 34
Missouri, Kansas & Texas Ry. Co. v. *Elliott*, 184 U. S. 530 24
Mondou v. *New York, N. H. & H. R. R. Co.* 223 U. S. 1 35
National Broadcasting Co. v. *United States*, 319 U. S. 190 29
National Licorice Co. v. *National Labor Relations Board*, 309 U. S. 350 ..... 37, 41
Nutt v. *Knut*, 200 U. S. 12 ..... 2, 25
Pennsylvania Co. v. *United States*, 236 U. S. 351 34
Red River Broadcasting Co. v. *Federal Communications Comm'n*, 98 Fed (2d) 282 ..... 36, 37, 38
Rochester Telephone Corp. v. *United States*, 307 U. S. 125 33
Ryan v. *KVL, Inc.*, 88 Pac. (2d) 836 40
State Tax Commission v. *W. Q. Van Cott*, 306 U. S. 511 19
Standard Oil Co. v. *Johnson*, 316 U. S. 481 26
Sullivan v. *Texas*, 207 U. S. 416 24
Swayne & Hoyt, Ltd. v. *United States*, 300 U. S. 297 33
Taylor v. *Superior Motor Co.*, 227 N. C. 365, 42 S. E. (2d) 460 35
Testa v. *Katt*, 330 U. S. 386 35
Texas and Pacific Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426 ..... 2, 25
Union Dry Goods Co. v. *Georgia Public Service Corp'n*, 248 U. S. 372 ..... 15, 39, 41
Venner v. *Michigan Central R. R. Co.*, 271 U. S. 127 ..... 19, 33
Williams v. *Bruffy*, 102 U. S. 248 24

STATUTES CITED

Communications Act of 1934, Chap. 5, Title 47, U.S.C.A. 43
Constitution of Georgia of 1945, Art. VI, Par. VIII 18
Constitution of the United States, Article VI 3, 14, 20, 35
Judicial Code, section 1257 (3) as amended (Title 28, United States Code, Section 1257(3)) 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 820

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,

Petitioner,

vs.

W. E. CARROLL, CLARENCE H. CALHOUN, MRS. HATTIE J. PICKARD, MRS. EMMA B. MOORE, AND SAM PICKARD, TRUSTEE FOR SAM PICKARD, JR.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

A

Summary Statement of the Matter Involved

This is a petition for a Writ of Certiorari to review the judgment of the Court of Appeals of Georgia entered on October 27, 1948, affirming the judgment of the Superior Court of Fulton County, Georgia, in favor of the respondents and against petitioner (R. 138) and the judgment

entered December 15, 1948, denying rehearing (R. 148). A petition for a writ of certiorari to the Supreme Court of Georgia was filed on January 7, 1949 (R. 149) and was denied on March 16, 1949 (R. 150).

B

Jurisdiction to Grant the Writ

The judgment of the Court of Appeals of Georgia, entered on October 7, 1948, adhered to upon rehearing on December 15, 1948, and stayed pending the decision of the Supreme Court of Georgia upon the petition for writ of certiorari, was entered on March 16, 1949. The mandate of that court has now been stayed pending determination of this petition. When the Supreme Court of Georgia denied certiorari the judgment of the Court of Appeals of Georgia became a final judgment of the highest court in Georgia to which the case could be taken.

The jurisdiction of this court is invoked under Section 1257(3) of the Judicial Code, as amended by the Act of June 25, 1948 (Title 28, United States Code, Section 1257(3)), on the ground that the decision below denied a title, right, privilege and immunity claimed by petitioner under the Communications Act of 1934, particularly Sections 307 (a), 308 (b), 309 (a), 310 (b) and 402 (b) thereof. The authorities relied on to sustain such jurisdiction are *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Nutt* v. *Knut,* 200 U. S. 12; and, other cases cited in Part B of the supporting brief (*infra* pp. 18-19).

C

Questions Presented

1. Whether a decision of the Federal Communications Commission, holding that a particular contract made be-

tween a radio station licensee and third parties adversely affects the ability of the radio station to properly function in the public interest, is a determination binding upon a state court under Article VI of the United States Constitution, or whether the state court may ignore that determination and rule to the contrary?

2. Whether a state court may substitute its judgment for that of the Federal Communications Commission as to the effect of such a contract upon the ability of a radio station to function in the public interest.

3. Whether a state court, by substituting its judgment for that of the Federal Communications Commission as to the effect of a particular contract upon the ability of the radio station to function in the public interest, collaterally attacks a decision of the Federal Communications Commission and invades the exclusive jurisdiction vested in the Federal Communications Commission under the provisions of the Communications Act of 1934, and amendments thereto, by annulling in legal effect, the orders of the Commission of September 19, 1945 and November 9, 1945.

4. Whether in the instant case the judgment of the Court of Appeals of Georgia deprives petitioner of rights, titles, privileges, and immunities set up and claimed under a statute of the United States (Communications Act of 1934).

5. Whether, aside from the jurisdictional issues, the decision below was contrary to the decisions of the Supreme Court of the United States construing the Communications Act of 1934, by giving effect to private contractual rights of parties superior to and in conflict with the power of federal regulation under the Communications Act of 1934.

D

Material Facts and Proceedings Before the Communications Commission and the Courts Below

This case presents a conflict between the authority and jurisdiction of the Federal Communications Commission, under the Communications Act of 1934, and the authority and jurisdiction of the Georgia State Courts, with respect to the binding effect of a determination by the Commission that a particular contract adversely affects the ability of a radio station to function in the public interest. It squarely raises the question whether, in a suit in the state courts upon that contract, the state courts are free to determine, contrary to the finding of the Commission, that the contract does not affect the ability of the radio station to function in the public interest, and give damages for its breach, or whether the state courts are bound by the determination of the Commission and must adjust the rights of the parties in the light of that determination.

The decision and judgment of the Court of Appeals of Georgia herein complained of arises out of the following situation:

The Original Situation

Petitioner owns and operates Radio Station WGST, in the City of Atlanta, as a trust for and on behalf of the Georgia School of Technology. On June 18, 1936, petitioner entered into a management contract with Southern Broadcasting Stations, Inc. for a period ending January 6, 1950. Under the terms of the management contract Georgia Tech was receiving ten per cent of the gross receipts from the operation of the station. This was the situation on January 31, 1940 when the Georgia School of Technology filed its application for renewal of its broadcasting license with the

Federal Communications Commission (hereinafter referred to as the Commission).

First Proceedings Before the Commission

Instead of renewing the station's license, the Commission challenged the propriety and legality of the further operation of Radio Station WGST by petitioner through Southern Broadcasting Stations, Inc. as being not in the public interest, and as being in contravention of the Federal Communications Act.

Southern Broadcasting Stations, Inc. thereupon intervened in the matter. After hearing, the Commission issued proposed findings of fact and conclusions of the Commission on March 23, 1943 (R. 33). The findings of fact and conclusions were extensive. In substance it was determined by the Commission that the station, under the contract with Southern Broadcasting Stations, Inc., was being operated in violation of the Federal Communications Act and that public interest, convenience and necessity would not be served by a renewal of license with the management contract in force. It was further determined that the failure to comply with the provisions of the Federal Communications Act was due to "misunderstanding and lack of knowledge rather than to bad faith on the part of" Georgia Tech, and it was provided that the Commission would consider a second application for renewal of license, *provided assurance was given that the full responsibilities of a licensee would be assumed.* It was directed that in the second application there should be set forth "the plan of the Station for the acquisition of the necessary facilities and equipment, and for the business management, representation, and control of its future operations." On May 8th, 1943 the proposed findings and conclusions of March 23, 1943 were made the findings and conclusions of the Commission (R. 46).

The Contract of April 15, 1943

As a result of this action by the Commission, representatives of petitioner entered negotiations with representatives of respondents (the latter being all the stockholders of Southern Broadcasting Stations, Inc.). Out of these negotiations came the contract of April 15, 1943 which forms the basis for this suit (R. 12). By said contract petitioner acquired all the capital stock of Southern Broadcasting Stations, Inc., procured the transfer of all the assets of the corporation to petitioner, and thereafter, in July of 1943, dissolved the corporation by surrendering its charter in Fulton Superior Court. Under the terms of the contract of April 15, 1943, petitioner agreed to pay to Fulton National Bank, as agent of the respondents, as the purchase price of the capital stock of the corporation, a sum equal to fifteen per cent of the net billings (gross receipts) of Radio Station WGST "from the sale of time on the air for any and all types of broadcasting, visual or sound, including any and all revenues which may be derived from such sources as a result of any new developments in the broadcasting field" for a period of 80¾ months and until January 6, 1950.

Further Proceedings Before the Commission

Thereafter, on May 22, 1943, petitioner filed its *second* application for a renewal of its license. As an exhibit to the second application for license renewal petitioner attached a copy of the contract of April 15, 1943 as its plan for acquiring the necessary facilities and equipment of Southern Broadcasting Stations, Inc., including the business management, representation and control of the future operations of the station (R. 48). Petitioner requested the Commission to grant the license applied for without hearing (R. 55), but this was denied (R. 63).

Thereafter the matter was heard by the Commission. After consideration of the application and the testimony presented by petitioner, the Commission issued proposed findings of fact and conclusions of the Commission on September 19, 1945 (R. 64). In substance the Commission found *"that the arrangements under the contract of April 15, 1943 would jeopardize the licensee's financial ability to conduct the future operation of the station in the public interest, and that, therefore, public interest, convenience or necessity would not be served by a grant of the instant application"* (R. 70). As additional reasons for determining that public interest, convenience or necessity would not be served by granting the license to the station with the contract of April 15, 1943 in force, the Commission concluded *that the payments of 15% of the gross income of the station would have the effect of hampering and restraining the station from entering the fields of Frequency Modulation and Television broadcasting* (R. 70). The Commission further concluded that the arrangements under the contract of April 15, 1943 *would amount to the respondents receiving indirectly what the Commission had determined by its orders of March 23rd and May 8th, 1943 could not be received directly by Southern Broadcasting Stations, Inc. because of violation of the Federal Communications Act.* This, the Commission said, *"would, in effect, condone such illegality and thwart the Commission's efforts to enforce the requirements of the Act"* (R. 70).

By the order of September 19, 1945 the Commission determined that *a granting of the second application for license renewal would not serve the public interest, convenience or necessity and should therefore be denied,* but without prejudice to the filing of a further application by petitioner before December 18, 1945, *"provided it is affirmatively shown that no further effect is given to the agree-*

ments between the Georgia School of Technology and Southern Broadcasting Stations, Inc., which the Commission has found in Docket 5903 (the proceedings on the first application for license renewal) *and in this proceeding to be contrary to the Communications Act and incompatible with the operation of the station in the public interest''* (R. 71).

The Action Taken by Petitioner

Upon receipt of the order of the Commission of September 19, 1945, petitioner made no further payments under the contract of April 15, 1943, and on October 11, 1945, the Board of Regents, the governing body of petitioner, passed the following resolution:

> ''Resolved, by the Board of Regents of the University System of Georgia, that the ruling of the Federal Communications Commission having made the contract with the stockholders of Southern Broadcasting Stations, Inc. legally impossible of performance, the board hereby approves the action of its WGST Radio Committee in directing that said contract be not further complied with. This action is taken without prejudice to a fair adjustment or settlement of whatever rights the said stockholders may have, subject to the approval or consent of the Federal Communications Commission'' (R. 72).

On November 9, 1945 the proposed findings of fact and conclusions of September 19, 1945 were adopted by the Commission as its findings of fact and conclusions upon the second application of petitioner for renewal of the license of Radio Station WGST (R. 72).

The Third Application for License Renewal

On December 4, 1945 petitioner filed its *third* application for license renewal. At the same time it filed an application for a construction permit. As an exhibit to both applica-

tions it filed a statement affirmatively showing that no further effect was being given to the agreements condemned by the Commission (R. 79). Thereafter, on March 7, 1946, the application was granted and the license renewal was issued (R. 81).

From the time in 1940 when petitioner's previous license expired until the issuance of the license renewal on March 7, 1946, Station WGST continued operations under temporary licenses granted by the Commission. Since the issuance of the license of March 7, 1946 there has been another license renewal on May 1, 1947, which runs until May 1, 1950. The radio station is being currently operated under this license.

Proceedings in the Trial Court

From September 19, 1945 until June 18, 1947 the respondents took no action. They then filed suit in Fulton Superior Court for an accounting and for a judgment for 15% of the gross income from the operation of the station from August 1, 1945 to the date of judgment (R. 9).

Petitioner filed its answer in which it admitted that prior to the decision of the Commission on September 19, 1945 it had paid under the contract the sum of $148,408.38. It admitted the execution of the contract of April 15, 1943 and admitted a *prima facie* case on behalf of the respondents. Further answering it set up as an affirmative defense the actions of the Commission and petitioner as heretofore outlined in this statement of facts. By amendment petitioner showed that, according to its books and records, 15% of the net billings (gross income) of Radio Station WGST, from August 1, 1945 through August 31, 1947 amounted to the sum of $144,968.63 (R. 85).

By agreement of all parties, all matters of law and fact were submitted to the trial court, sitting without the intervention of a jury. The case was tried upon an agreed state-

ment of facts, stipulations of the parties and certain documentary evidence introduced without objection. Evidence was introduced in support of the statement of facts heretofore set out.

In addition it was stipulated between the parties that Southern Broadcasting Stations, Inc., which was owned by respondents prior to April 15, 1943, was a party as intervenor to the proceedings before the Commission which resulted in the proposed findings of fact and conclusions of the Commission of March 23, 1943, whereby the first application of petitioner for license renewal was denied. These proceedings were designated by the Commission as Docket Number 5903 (R. 94).

It was further stipulated that respondents had *actual knowledge* of the filing by petitioner of the second application for renewal of license and which was designated by the Commission as Docket Number 6534; that respondents had *actual notice* of the order of the Commission, dated October 12, 1943, assigning the matter for hearing; that respondents had *actual knowledge* of the hearing before the Commission and of the proposed decision of September 19, 1945; that respondents also had *actual knowledge* of the final order of the Commission, dated November 9, 1945, wherein petitioner's second application for license renewal was denied; and that *the respondents had actual knowledge of such matters at the times said matters were taking place* (R. 94).

Evidence was introduced to show that under the law and the rules of the Commission *respondents had the right at any time to intervene in the proceedings on the second application for license renewal,* just as Southern Broadcasting Stations, Inc. had intervened in the proceedings on the first application; that the right of intervention existed after, as well as before, the ruling of the Commission on the second application; and that respondents had the same right of

statutory appeal as petitioner from the denial by the Commission of the second application for license renewal (R. 97).

It was stipulated by the parties that at the time the respondents entered into the contract of April 15, 1943 with petitioner they knew that the operation of Radio Station WGST depended upon a license so to operate from the Commission and that said operation was subject to Federal regulation and control under the Communications Act of 1934, as administered by the Commission (R. 95).

And it was stipulated that *the respondents also knew that under the Communications Act of 1934 the Commission had jurisdiction over any contract or agreement affecting the operation of a radio station in the public interest or affecting the present or future financial ability of a radio station to operate in the public interest* (R. 95).

It was likewise stipulated that in the hearing before the Commission based upon the notice of such, dated October 12, 1934 (the hearing on the second application for license renewal) the evidence as to the value of the equipment of the radio station acquired by the petitioner from the respondents or Southern Broadcasting Stations, Inc. ranged between $40,000.00 and $70,000.00 and that at that time, which was in 1943, such equipment was very difficult, if not impossible, to acquire (R. 95).

It was also stipulated that the license under which Radio Station WGST was operating in April of 1943 was a temporary license and extension of its prior license, and that said license and extension of said license had expired (R. 96).

The Judgment and Decree in the Trial Court

At the conclusion of the evidence, and after hearing oral argument, the Court took the matter under advisement, and thereafter, on October 6, 1947, *passed a preliminary order*

and decree finding that the Commission was without jurisdiction to nullify, change or anywise modify the duties and obligations of the parties to the contract of April 15, 1943, that the action of the Commission did not constitute a valid defense or bar as a matter of fact or law to the rights of the respondents to enforce the provisions of the contract, that said actions did not render further performance of the contract by petitioner impossible, that respondents were entitled to an equitable accounting, and that they were entitled to a decree ordering petitioner to pay to them the amount found by the court to be due (R. 108). Thereafter on October 10, 1947, a final order, judgment and decree was entered in favor of the respondents and against petitioner in accordance with the preliminary order of October 6, 1947 (R. 122).

The Decision of the Court of Appeals of Georgia

Petitioner brought the case to the Court of Appeals of Georgia, which court affirmed the decision of the trial court. In the course of its opinion the Court of Appeals of Georgia held:

> ". . . but nothing in the power granted to the Commission (Federal Communications Commission) nor in said communications act of Congress (Communications Act of 1934, 47 USCA Sec. 151, et seq.) gives to the commission the power or authority to regulate the private contracts and business of those operating radio broadcasting stations, where same is not necessary in the protection of the public interest, and where such contracts do not affect the interstate transactions of the radio station" (R. 127).
>
> "It does not appear that the subject matter of the contract was affected with such a public interest as to justify the same to be nullified by the order of a governmental agency, charged by act of Congress under the authority of the Commerce Clause of the Constitution with the power to license radio broadcasting stations

and to regulate their interstate transactions, ..." (R. 136).

"It cannot be anticipated that the contract sued on, insofar as it related to the payment of the agreed purchase price of this stock and of the assets of the corporation, giving to the regents complete control of the station and its operation, would so far affect the financial ability of the radio station as to render the radio station unable to operate in the public interest. The evidence fails to show that the contract would affect the public interest in reference to the broadcasts of this station" (R. 137).

". . . it not appearing that the payment of such purchase price would render the radio station unable to operate in the public interest . . ." (R. 137).

"Judge Almand (the trial judge) denied the contentions of the defendant as to the legal impossibility to perform the contract sued on by reason of an act of law and that the regents were therefore excused from performance, and ruled that the Federal Communications Commission was without power to take any action which would have the effect of nullifying, changing or in anywise modifying the duties and obligations of the parties to said contract thereunder, . . ." (R. 130).

"Taking the above view, the other contentions of the regents are necessarily to be determined adversely to the regents and are controlled thereby and the trial judge's ruling and judgment excepted to was not erroneous for any of the reasons assigned" (R. 138).

E

Reasons for Granting the Writ

(1) The questions presented in this petition for certiori are of great general importance. They involve nothing s than the power of the Federal Communications Comssion to control effectively the issuance and renewal of enses for radio broadcasting in the public interest. The

issue is squarely presented here as to the weight and dignity that should be accorded to the determination of a federal administrative agency in a field in which federal power is exclusive, when such a determination is relevant in the resolution of a private controversy by a state court.

(2) The court below has failed to give effect in the instant case to the determination of the Commission that the contract in controversy adversely affects the ability of the radio station to function in the public interest. On the contrary, it has substituted its own judgment for that of the Commission upon the matter, although the Commission, under the Communications Act of 1934, is the only proper agency to determine that question, and its determination is binding and conclusive unless reversed on appeal as provided by statute.

(3) The questions presented here are of substance and gravity and affect the public interest and welfare, raising the issue as to whether a decision by a federal administrative agency, acting under a federal law upon a matter subject to federal regulation and dealing with the public interest and welfare, can be collaterally attacked in the state courts, or whether the state courts are bound by such decision under Article VI of the Constitution of the United States which provides that . . . "the laws of the United States . . . shall be the supreme Law of the Land."

(4) The court below has decided issues of public as well as private concern, over which the Communications Commission was vested by Congress with exclusive jurisdiction. This case does not involve the preservation of the delicate balance between federal and state power. The court below, at the outset, recognizes the power of the Commission over the grant of radio licenses in the public interest and juris-

diction to pass upon a contract affecting the ability of a radio station to so operate in the public interest. It then concludes that "The evidence fails to show that the contract would affect the public interest in reference to the broadcasts of this station" (R. 137). The record of the proceedings before the Commission was pleaded and introduced in evidence in the trial court (R. 20, 64). The court below ignored the decision of the Commission in order to give effect to the private contractual claims of the respondents. The holding below is thus in direct conflict with the long standing view of this Court that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the proper administrative agency. See *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U. S. 372.

(5) The decision below cannot be sustained as involving purely non-federal questions. Rather the court below acknowledged that federal questions were involved, but decided them contrary to and in conflict with prior decisions of this Court.

(6) The ruling below, if allowed to stand, will destroy the power of the Commission effectively to control and regulate the highly competitive and complex field of radio, will encourage a multiplicity of suits and will result in conflicting court decisions in a field where the public interest demands uniformity of administration through a single federal commission. Further, it will undermine the validity and force of all decisions and rulings of administrative agencies enforcing federal laws.

Wherefore, your petitioner prays that a Writ of Certiorari be granted under the seal of this Court directed to the Court of Appeals of Georgia, to the end that this cause

may be reviewed and determined by this Court as provided for by the Statutes of the United States; and for such further relief as to this Court may seem proper.

EUGENE COOK,
The Attorney General of Georgia.
HAMILTON LOKEY,
Deputy Asst. Attorney General of Ga.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 820

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

Petitioner,

vs.

W. E. CARROLL, CLARENCE H. CALHOUN, MRS. HATTIE J. PICKARD, MRS. EMMA B. MOORE, AND SAM PICKARD, TRUSTEE FOR SAM PICKARD, JR.

Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

A

Opinions Below

The judgment of the Superior Court of Fulton County, Georgia (R. 122) is unreported. The opinion of the Court of Appeals of Georgia of October 7, 1948 is reported in 50 S. E. (2d) 808. The denial of the motion for rehearing (without opinion) on December 15, 1948 and the denial of the petition for certiorari by the Supreme Court of Georgia (without opinion) on March 16, 1949 are not yet reported.

B

Jurisdiction

In addition to the statements and citations contained in the petition for certiorari (*supra*) it is contended that the Supreme Court of the United States has jurisdiction to review the judgment in this case because:

1. The judgment of the Court of Appeals of Georgia entered October 7, 1948 (R. 138) as adhered to on motion for rehearing on December 15, 1948 (R. 148) and upon which the Supreme Court of Georgia denied certiorari on March 16, 1949 (R. 150) constitutes a final judgment.

Department of Banking, State of Nebraska v. *Pink*, 317 U. S. 264.

Citizens Bank of Michigan City v. *Opperman*, 249 U. S. 448.

2. The judgment sought to be reviewed is by the highest Court of the State of Georgia to which this case could be taken.

Art. VI, Par. VIII, Constitution of Georgia of 1945.
Gregory v. *McVeigh*, 23 Wall. 294.

3. The federal questions sought to be reviewed were properly raised and preserved in the Courts of Georgia by:

(a) The answer in the Superior Court of Fulton County (R. 17).

(b) The Bill of Exceptions to the court of review (R. 1).

(c) The petition for certiorari to the Supreme Court of Georgia (R. 149).

Green Bay & Mississippi Canal Co. v. *Patten Paper Co.*, 172 U. S. 58.

4. The decision below denied a title, right, privilege or immunity claimed by petitioner under Sections 307(a),

308(b), 309(a), 310(b) and 402(b) of the Communications Act of 1934.

5. The judgment of the Court of Appeals of Georgia does not rest upon a non-federal ground which independently and adequately supports its judgment (R. 127).

(a) A state court cannot, by resting its judgment upon some ground of local or general law, defeat the appellate jurisdiction of the Supreme Court of the United States, if a Federal right or immunity was specially set up or claimed which, if recognized and enforced, would require a different judgment.

Chicago, Burlington & Quincy Railway Co. v. *People of the State of Illinois ex rel,* 200 U. S. 561.

(b) The Supreme Court of the United States has jurisdiction to review a decision of a state court involving both a federal and a non-federal ground where the non-federal ground is so interwoven with the federal ground as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without a decision of the other ground.

Abie State Bank v. *Bryan, Governor of Nebraska, et al.,* 282 U. S. 765;

State Tax Commission, et al. v. *W. Q. Van Cott,* 306 U. S. 511.

6. The question presented is one of substance and importance, as is more fully stated under Part G. of this brief (*infra,* pp. 24-41).

Venner v. *Michigan Central RR. Co.,* 271 U. S. 127;

General American Tank Car Corp. v. *El Dorado Terminal Co.,* 308 U. S. 422;

Armour and Co. v. *Alton Railroad Company, et al.,* 312 U. S. 195.

C

Statutes Involved

Article VI of the Constitution of the United States provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding."

The applicable sections of the Communications Act of 1934, as amended, to-wit: Sections 307(a), 308(b), 309(a), 310(b) and 402(b) are set forth in Appendix A (*infra*, pp. 43-46).

D

Statement

A full statement of the case has been given under the heading "D" in the Petition for Certiorari, and to avoid duplication is not repeated (*supra*, pp. 4-13).

E

Specification of Errors to Be Urged

The Court of Appeals of Georgia erred:

(1) In failing to give effect to the determination of the Communications Commission that the contract in controversy adversely affects the ability of the radio station to function in the public interest.

(2) In determining that the contract does not affect the ability of the radio station to function in the public interest when the Communications Commission, the agency desig-

nated by the Congress to decide such questions, has determined, after full hearing, exactly the contrary.

(3) In substituting its judgment for that of the Commission in regard to a matter of both public and private concern and as to which the Congress has vested exclusive jurisdiction in the Commission and has provided that its determination is binding and conclusive unless and until reversed on appeal as provided by statute.

(4) In collaterally attacking the decision of the Commission upon the matter in violation of Article VI of the United States Constitution.

(5) In nullifying, by its decision, the prior decisions of the Communications Commission relative to the contract in controversy, and in effect requiring petitioner to specifically perform a contract which the Commission has declared cannot be performed consistent with the public interest.

(6) In its opinion of October 7, 1948 by holding "The evidence fails to show that the contract would affect the public interest in reference to the broadcasts of this station." (R. 137) and by holding ". . . it not appearing that the payment of such purchase price would render the radio station unable to operate in the public interest . . . ." (R. 137).

(7) In failing to recognize and respect the principle enunciated by this Court that the right of private contract must give way to the exigencies of the public welfare when determined in an appropriate manner by proper authority, and the further principle that those who contract with reference to the business of radio broadcasting have no rights superior to the exercise of the power of federal regulation under the Communications Act of 1934.

(8) In failing to give effect to the determination of the Commission condemning the contract as contrary to the

public interest and adjusting the rights of the parties thereto in the light of that determination.

(9) In ruling that the Commission "was without power to take any action which would have the effect of nullifying, changing or in anywise modifying the duties and obligations of the parties to said contract . . ." (R. 130, 138).

(10) In failing, because of the foregoing, to sustain the defense of petitioner to the suit.

(11) In depriving petitioner, through the foregoing, of the rights, privileges and immunities vested in it under the Communications Act of 1934.

F

Summary of Argument

I. The judgment sought to be reviewed was final, federal questions were properly raised and were decided by the court adverse to petitioner, and the decision below did not rest upon an independent and adequately supported non-federal ground.

II. The court below has decided issues of both public and private concern, over which the Communications Commission was vested by Congress with exclusive jurisdiction.

(a) The issues decided were of public as well as private concern.

(b) The Commission, after hearing, had determined that the contract in controversy was contrary to the public interest.

(c) The court below failed to give effect to this determination and instead reached the opposite conclusion.

(d) The ruling of the court below collaterally attacks the decision of the Commission in violation of Article VI of the Constitution.

III. The decision of the Commission was binding upon the Respondents although they were not formal parties to the hearing.

(a) The corporation owned by Respondents was a party by intervention to the first hearing.

(b) The contract with Respondents was made as a result of the decision of the Commission on the first hearing and in an effort to comply with that decision.

(c) Respondents had actual notice and actual knowledge of the hearing resulting in the condemnation of the contract and actual knowledge of the decision of the Commission in regard thereto.

(d) Respondents as aggrieved parties whose interests were adversely affected by the decision had the same right of statutory appeal under Section 402(b) of the Communications Act of 1934 as did petitioner.

(e) No appeal was taken, and the decision of the Commission is binding upon petitioner and respondents alike.

IV. The determination of the rights of the parties must be made in the light of and with reference to the decision of the Commission.

(a) Those who contract with regard to radio broadcasting necessarily do so subject to the paramount right of federal regulation.

(b) Private contractual rights in the field of radio must give way to the exigencies of the public welfare.

V. The decision below was contrary to the decisions of this Court in giving effect to private contractual rights superior to and in conflict with the power of federal regulation under the Communications Act of 1934.

VI. The case is of vital public importance.

G

ARGUMENT

I

The judgment sought to be reviewed was final, federal questions were properly raised and were decided by the Court adverse to petitioner, and the decision below did not rest upon an independent and adequately supported non-federal ground.

The following cases clearly establish that the decision of the court below was a final judgment of the highest court in Georgia to which this case could be taken.

In *Citizens Bank of Michigan City* v. *Opperman*, 249 U. S. 448, the Court ruled that a judgment of a state court becomes final for purposes of review in the Federal Supreme Court by writ of error or certiorari in a case in which a petition for rehearing is entertained, upon the date of the denial or other disposition of such petition.

In *Gregory* v. *McVeigh*, 23 Wall 294, at page 306, the Court said:

> "It has long been settled that if a cause cannot be taken to the highest court of a state, except by leave of the court itself, a refusal of the court upon proper application made to grant the leave, is equivalent to a judgment of affirmance, and is such a final judgment as may be made the basis of proceedings under the appellate jurisdiction of this court."

To the same effect, see

Sullivan v. *Texas*, 207 U. S. 416;

Bacon v. *Texas*, 163 U. S. 207;

Williams v. *Bruffy*, 102 U. S. 248;

Missouri, Kansas & Texas Railway Co. v. *Elliott*, 184 U. S. 530.

As to the Federal questions involved, the following cases are controlling:

In *Texas and Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, it was held that where the defendant in the state court contends that, consistently with the Interstate Commerce Act, the state court has no power to grant the relief, and such contention is essentially involved and expressly, and, in order to support the judgment, necessarily, decided adversely to the defendant, a Federal question exists and this Court can review the judgment.

It was ruled in *Nutt* v. *Knut*, 200 U. S. 12, at page 19, that:

> "The case, so far as our jurisdiction is concerned, is therefore within Sec. 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), which authorizes this court to re-examine the final judgment of the highest court of a state, 'where any title, right, privilege or immunity' is claimed under a statute of the United States, and the decision is against such title, right, privilege, or immunity specially set up or claimed. *A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of Sec. 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary.*" (Emphasis supplied.)

In *Hussman* v. *Durham*, 165 U. S. 144, at page 147, the Court said:

> "A motion to dismiss was submitted by the defendant in error, but as the supreme court of the state held that the equitable title apparently conveyed by the proceedings in the United States Land Office in 1858 was of no effect, and the tax titles based thereon of no validity, it is apparent that a right claimed under the authority of the United States was denied, and therefore this court has jurisdiction."

In *Dubuque & Sioux City Railroad Co. et al.* v. *Richmond*, 15 Wall. 3, this Court held that where the record shows that the plaintiffs in error claimed in the state court that contracts made with the defendants in error had been rendered void and of no force and effect by provisions of the Constitution of the United States, and of certain Acts of Congress, and that the decision of the Supreme Court of the State denied this claim, then this Court has jurisdiction of the case.

In *Crescent City Live Stock Co.* v. *Butcher's Union Slaughter-House Co.*, 120 U. S. 141, at page 146, the Court said:

> "The question whether a state court has given due effect to a judgment of a court of the United States is a question arising under the Constitution and laws of the United States, and comes within the jurisdiction of the federal courts by proper process . . ."

In *Hall Neilson* v. *Wilson Lagow*, 7 How. 772, Chief Justice Taney, speaking for the Court, at page 775, said:

> "It appears that in the trial in the State Court, the plaintiff in error claimed the land in dispute under an authority which he alleged had been exercised by the Secretary of the Treasury in behalf of the United States; and the decision was against the validity of the authority thus alleged to have been exercised. . . . and the only point to be determined at this time is, whether we have jurisdiction to try and decide it. We think it is evidently one of the cases prescribed for in the twenty-fifth section of the Act of 1789; and the motion to dismiss is therefore overruled."

To the same effect see:

Standard Oil Co. of Calif. v. *Johnson, Treasurer of Calif.*, 316 U. S. 481.

That the Federal right or immunity was set up, of record, is established by the decision in *Green Bay & Mississippi Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, where it was held, at page 66:

> "The contention that no Federal question is disclosed in the record is sufficiently disposed of, we think, by an inspection of the cross-complaint filed by the Green Bay and Mississippi Canal Co. It was therein claimed that the water power in question was created by a dam, canal, and other improvements owned and operated by the United States, and that the right and title of the said canal company to the use of the water power so created arose under and by virtue of certain alleged and recited Acts of Congress . . . and especially by virtue of an alleged contract between the United States and the canal company . . .
>
> "But no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court."

A state court cannot, by resting its judgment upon some ground of local or general law, defeat the appellate jurisdiction of the Supreme Court of the United States if a Federal right or immunity was specially set up or claimed which, if recognized and enforced, would require a different judgment. Thus, in *Chicago, Burlington & Quincy Railway Co.* v. *People of the State of Illinois ex rel*, 200 U. S. 561, at page 580, the Court said:

> ". . . the general rule is that where the judgment of the state court rests upon an independent, separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however the Federal question raised on the record might be determined,

this Court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. *But it is equally well settled that the failure of the state court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law.*" (Emphasis supplied.)

In *Enterprise Irrigation District, et al.*, v. *Farmers Mutual Canal Co. et al.*, 243 U. S. 157, it was ruled, at page 164:

> "But where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain."

To the same effect, see:

Abie State Bank v. *Bryan, Governor of Nebraska, et al.*, 282 U. S. 765.

II

The court below has decided issues of both public and private concern over which the Communications Commission was vested by Congress with exclusive jurisdiction.

(a) *The issues decided were of public as well as private concern.* The decision below turned upon the determination by the court that the contract in question would not affect the public interest in reference to the broadcasts of petitioner's radio station (R. 137), the court holding ". . . it not appearing that the payment of such purchase price would render the radio station unable to operate in the public interest . . ." (R. 137).

These conclusions, we submit, involve judgments on issues in which the public as well as the contracting parties were interested and over which the Federal Communications Commission had exclusive jurisdiction under Section 308(b), insofar as the burdens of the contract affected the ability of the station to function in the public interest.

In granting a license, or renewal of license, the Commission is charged with the responsibility of investigating all factors and all matters, financial and otherwise, bearing upon the ability of a radio station to function in the public interest, *including contracts of the licensee which affect its ability to function in the public interest and in conformity with the Communications Act.* As was said by this Court in *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U. S. 470, at page 475:

> "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured the Act contemplates inquiry by the Commission, *inter alia,* into an applicant's financial qualifications to operate the proposed station."

The authority of the Commission to exercise powers conferred on it by the Communications Act in connection with contracts affecting the public interest in radio has been upheld by this Court in *National Broadcasting Co.* v. *United States,* 319 U. S. 190.

See also:

Churchill Tabernacle v. *Federal Communications Commission,* 160 Fed. (2nd) 244 (CCA DC).

(b) *The Commission, after hearing, had determined that the contract in controversy was contrary to the public interest.* Pursuant to its statutory duty the Commission made

inquiry into the application for renewal of license filed by petitioner on May 22, 1943. After a full hearing it determined that the contract of April 15, 1943 placed such financial burdens upon the station that it could not properly function in the public interest, and that its future operation in the public interest was seriously jeopardized (R. 70). The Commission had additional objections to the operation of the station with the contract in effect. It felt that the burden of the contract would hamper the station in its expansion into the fields of FM and Television broadcasting (R. 70). It also challenged the contract on the ground that it was an effort to condone a previous illegal arrangement condemned by the Commission (R. 70). In the light of these findings the Commission concluded that the grant of a license with the contract in force would not be in the public interest and denied the application (R. 71).[1]

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[1] The findings and decision of the Commission were as follows:

"4. In view of the foregoing, the Commission concludes that the arrangements under the contract of April 15, 1943, would jeopardize the licensee's financial ability to conduct the future operation of the station in the public interest and that, therefore, public interest, convenience or necessity would not be served by a grant of the instant application.

"5. There are additional reasons why under the arrangements made in the contract of April 15, 1943, public interest, convenience or necessity would not be served by a grant of this application. The assumption by the applicant of a burden amounting to 15% of its gross income resulting not only from the operations of Station WGST but from all new broadcasting developments, including FM and television, would have the effect of restraining the licensee from entering the field of FM and television broadcasting. Such a restraint does not appear to be in the public interest.

"6. Moreover, it seems clear that the payments of 15% of the gross income represent an effort on the part of the parties to give further effect to the agreement by which control of Station WGST had been illegally transferred to Southern Broadcasting Stations, Inc. As pointed out, these payments are to continue to January 6, 1950, the date when the 1936 agreement would have expired if that contract had not been terminated. Southern Broadcasting Stations, Inc. asserts ownership to the equipment of WGST, which has an estimated value

(c) *The court below failed to give effect to this determination and instead reached the opposite conclusion.* Without conducting any hearing upon the subject, and with no evidence before it except the contract itself and the record of the hearing before the Commission, the court below made a determination that the contract *did not* affect the ability of the station to function in the public interest, a determination completely contrary to that reached by the Commission. This remarkable situation is only explainable in one way. The court below was determined to give effect to the contract and could find no way to do so as long as it recognized that the contract was contrary to the station's operation in the public interest. It therefore proceeded to rationalize away the impediment with a finding that the contract did not affect the ability of the station to function in the public

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of $50,000, but its title has been questioned. Aside from that, it does not now have and never has had any legal interest in the operation of the station. Accordingly, the payments provided for in the contract of April 15, 1943, and estimated on the basis of the station's present operations to total over $300,000 represent a payment to Southern Broadcasting Stations, Inc. far in excess of that Corporation's legal interest, if any in WGST. A grant of the renewal application under circumstances where a party to an arrangement found by the Commission to be in contravention of law would continue to profit from such arrangement would not be in the public interest since it would, in effect, condone such illegality and thwart the Commission's efforts to enforce the requirements of the Act.

"7. Therefore, the Commission concludes that a granting of this application of the Georgia School of Technology for renewal of the license of radio station WGST would not serve the public interest, convenience or necessity. The application, therefore, should be denied, without prejudice, however, to the submission within ninety days by the Georgia School of Technology of a new application for a construction permit and license to operate on the same frequency, provided it is affirmatively shown that no further effect is given to the agreements between the Georgia School of Technology and Southern Broadcasting Stations, Inc., which the Commission has found in Docket 5903 and in this proceeding to be contrary to the Communications Act and incompatible with the operation of the station in the public interest."

interest, followed by a decision that it was therefore not a matter within the jurisdiction of the Commission.

(d) *The ruling of the court below collaterally attacks the decision of the Commission in violation of Article VI of the Constitution.*

A decision of the Commission cannot be collaterally attacked in the courts of Georgia, and the state courts cannot substitute their judgment for that of the Commission as to what affects the ability of a radio station to function in the public interest. A statutory method of appeal is provided by the Communications Act (Sec. 402 (b), (c), (d), and (e)), and it is the *only* method by which a ruling of the Commission can be reversed or set aside.

Upon the question of the finality of an order of the Commission, and its freedom from collateral attack, the decision in *Black River Valley Broadcasts, Inc.* v. *McNinch, et al.*, 101 Fed. (2nd) 235, at page 237, is most illuminating:

> "The Commision is an administrative agency set up by Congress to determine under statutory direction the right of the people of the United States to have the best possible radio service. The interest, convenience, and necessity of the public is an essential test for the privilege of operating a radio station. This determination is, by the Act of 1934, lodged in the Commission. It is the only proper agency to decide these public questions, and its findings, under the law, must be maintained if they are not arbitrary or capricious, or erroneous in law, and are based upon substantial evidence. *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 53 S. Ct. 627, 77 L. Ed. 1166.
>
> "In the Act, Congress has made this Court the sole appellate body (with right to petition for certiorari to the Supreme Court) whereby the action of the Commission can be tested and has provided that any party aggrieved may have its rights reviewed here. It is well settled that the exclusive remedy provided by the stat-

> ute to test the Commission's action is vested in this court by appeal, from which it follows that other courts do not grant equitable relief in such cases."

As was said by this Court in *Rochester Telephone Corp.* v. *United States et al.*, 307 U. S. 125, at page 145:

> "So long as there is warrant in the record for the judgment of the expert body, it must stand."

In related fields it is equally well settled that the determination of a federal agency may not be collaterally attacked but may be challenged only in the appropriate review proceedings established by law. In *Swayne & Hoyt, Ltd., et al.*, v. *United States*, 300 U. S. 297, the Court, in discussing the close parallel between the Shipping Act and the Interstate Commerce Act, said, at page 303:

> "Both have set up an administrative agency to whose informed judgment and discretion Congress has committed the determination of questions of fact, on the basis of which it is authorized to make administrative orders.
>
> "Such determinations will not be set aside by courts if there is evidence to support them. Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment."

And in *Atchison, Topeka & Sante Fe Ry.* v. *Scarlett*, 300 U. S. 471, at page 474, it was said:

> "The judgment of the trial court and jury cannot be substituted for that of the Commission."

In *Venner* v. *Michigan Central Railroad Co.*, 271 U. S. 127, it was specifically held that a state court is without jurisdiction to pass on the validity of an order of the Interstate Commerce Commission in a suit by a stockholder against a railroad to enjoin it from carrying out an agreement, the

performance of which was authorized by the Interstate Commerce Commission. In holding that such a suit invaded the exclusive jurisdiction of the Commission the court said (page 130):

> "We agree with the court below that the suit is essentially one to annul or set aside the order of the Commission. While the amended bill does not expressly pray that the order be annulled or set aside, it does assail the validity of the order and pray that the defendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside."

The converse situation is presented here. The judgment of the court below is equivalent to an order to specifically perform what the Commission has been equally specific in saying the petitioner should not perform if it is to operate in the public interest. It is the clearest kind of collateral attack.

To the same effect, see:

Pennsylvania Co. v. *United States*, 236 U. S. 351.
Manufacturers Ry. Co. v. *United States*, 246 U. S. 457.
Mississippi Valley Barge Line Co. v. *United States, et al.*, 292 U. S. 282.
Hagens v. *United Fruit Company*, 135 Fed. (2nd) 842 (C. C. A. 2).
Ingraham v. *Union Stockyards Co.* 64 Fed. (2nd) 390 (C. C. A. 8).
Berg, et al. v. *Cincinnati, Newport & C. R. R. Co.* 56 Fed. Supp. 842.
Harris v. *Central Nebraska Public Power & Irrigation District*, 29 Fed. Supp. 425.

The decision of the Commission, lawfully made by it under authority granted by Congress, becomes part of the

supreme law of the land, which, under Article VI of the Constitution is superior to state constitutions and laws. Hence it is entitled to the same respect and dignity accorded to federal law, and the state courts of Georgia are without power to ignore that decision, or substitute another decision for it. To do so violates the provisions of Article VI of the Constitution, and it makes no difference that the state court expresses a contrary policy. As was said in *Mondou* v. *New York, N. H. & H. R. R. Co.*, 223 U. S. 1, at page 57:

> "The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people of all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State."

And in the recent case of *Testa, et al.* v. *Katt*, 330 U. S. 386, this court observed (page 394):

> "Our question concerns only the right of a state to deny enforcement to claims growing out of a valid federal law.
>
> • • • • • • •
>
> "Under these circumstances the State courts are not free to refuse enforcement of petitioner's claim."

See also:

Glover v. *Mitchell* 319 Mass. 1, 64 N. E. (2nd) 648.
Taylor v. *Superior Motor Co.* 227 N. C. 365, 42 S. E. (2nd) 460.

III

The decision of the Commission was binding upon the Respondents although they were not formal parties to the hearing.

(a) *The corporation owned by Respondents was a party by intervention to the first hearing.* When the Commission declined to renew the station license upon the first application of Petitioner, the management company, Southern Broadcasting Stations, Inc., intervened. This bound the company, of course.

(b) *The contract with respondents was made as a result of the decision of the Commission on the first hearing and in an effort to comply with that decision.* And it is an established principle that parties dealing upon a subject controlled by a Federal law are presumed to intend to contract with reference to the provisions of that law. See *Federal Land Bank of Columbia* v. *Shingler,* 174 Ga. 352, at page 361.

(c) *Respondents had actual notice and actual knowledge of the hearing resulting in the condemnation of the contract and actual knowledge of the decision of the Commission in regard thereto.* It was stipulated that the respondents had actual notice and actual knowledge of the various developments before the Commission, and that they had such notice and knowledge at the times these matters were taking place (R. 94).

(d) *Respondents as aggrieved parties whose interests were adversely affected by the decision had the same right of statutory appeal under Sec. 402(b) of the Communications Act as did Petitioner.* And it has been held that such aggrieved parties must be alert to protect their own interests by taking an appeal, or be bound by the decision of the Commission. That precise question was settled in *Red River Broadcasting Co., Inc.* v. *Federal Communica-*

tions Commission, 98 Fed. (2nd) 282, (cert. denied 305 U. S. 625), in this pertinent language (page 286):

> "The burden, therefore, is, and properly should be, upon an interested person to act affirmatively to protect himself. It is more reasonable to assume in this case a legislative intent that an interested person should be alert to protect his own interests than to assume that Congress intended the Commission to consider on its own motion the possible effect of its action in each case, upon every person who might possibly be affected thereby. Such a person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated. To permit such a person to stand aside and speculate on the outcome; if adversely affected, come into this court for relief; and then permit the whole matter to be reopened in his behalf, would create an impossible situation."

The same issue was decided by this Court in the case of *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, wherein the Court rejected the contention that a decision of the Labor Board relative to a contract embodying unfair labor practices was invalid because of the absence of individual employees (parties to the contract) as parties to the cause. As to the effect of the decision of this federal administrative agency upon private contract rights, the language of the Court (page 365) is quite clear:

> "It is sufficient to say here that it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it."

See in this connection:

Harris v. *Central Nebraska Public Power and Irrigation District*, 29 Fed. Supp. 425.

(e) *No appeal was taken, and the decision of the Commission is binding upon petitioner and respondents alike:*

Red River Broadcasting Co. v. *Federal Communications Commission* 98 Fed. (2nd) 282, (cert. denied 305 U. S. 625).

Black River Valley Broadcasts v. *McNinch, et al,* 101 Fed. (2nd) 235.

Atchison, Topeka & Sante Fe Ry. v. *Scarlett,* 300 U. S. 471.

IV

The determination of the rights of the parties must be made in the light of and with reference to the decision of the Commission.

It is apparent from the foregoing that the Georgia State courts are not free to disregard the decision of the Commission as to the effect of the contract upon the ability of the radio station to function in the public interest. It is equally apparent that aside from the regulatory power of the Commission over radio broadcasting, including contracts affecting the ability of a station to operate in the public interest, the contract would be enforceable under Georgia law. Here then is a serious conflict, but not an insoluble one. It has long been the law that where the public interest is involved there may well arise a limitation upon the rights and duties created by an otherwise enforceable contract. In our highly integrated society, it has become necessary to provide by law that in certain fields the public welfare—the public interest—demands that certain restraints be placed upon the absolute freedom of contract. To the extent that a contract conflicts with the declared public interest, the courts will decline to enforce it. This is no new departure. It is an accepted concept of our law.

(a) *Those who contract with regard to radio broadcasting necessarily do so subject to the paramount right of federal regulation.* This principle has been most forcefully stated by this Court in *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, at page 282, in the following language:

> "Those who operated broadcasting stations had no rights superior to the exercise of this power of regulation. They necessarily made their investments and their contracts in the light of and subject to this paramount authority. This Court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their enterprises."

(b) *Private contractual rights in the field of radio must give way to the exigencies of the public welfare.* The *Nelson Bros.* case (supra) covers this proposition completely, but in addition we would call attention to an earlier decision of this Court which is peculiarly in point. In *Union Dry Goods Company* v. *Georgia Public Service Corporation*, 248 U. S. 372, the Dry Goods Company complained that a new rate of the public service commission conflicted with an existing contract between the company and a public utility for electric power at a lower rate. To this contention the Court, after reviewing some of its prior decisions, said (page 377):

> "These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must

yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the State, and the judgment of the Supreme Court of Georgia must be Affirmed."

It is not the contention of the petitioner that the respondents in these circumstances should be remediless. It has never been the position of petitioner that it could keep what it has received from the respondents and give nothing in return. It does contend that under the circumstances it is not obligated to perform the contract in the sense that it is now required to pay for what it has received the strict measure of consideration called for by the terms of the contract itself. To do so would conflict with the decision of the Commission and be contrary to the public interest. *L & N R. R. Co.* v. *Mottley*, 219 U. S. 467). The solution must be found in the equities of the situation. In other words, respondents should receive fair and reasonable compensation for what they have given, even though they cannot enforce the contract itself. This is clearly a case for the application of the doctrine of equitable rescission.

See *Ryan* v. *KVL, Inc.* (Wash) 88 Pac. (2nd) 836.

V

The decision below was contrary to the decisions of this Court in giving effect to private contractual rights superior to and in conflict with the power of federal regulation under the Communications Act of 1934.

It is well established by numerous decisions of this Court that contracts made in relation to matters involving public interest, and within the federal regulatory power, must necessarily be regarded as having been made subject to the possibility that the exercise of the regulatory power might render such agreements unenforceable or impair

their value. To follow any other course would be to render sterile and impotent all federal regulatory power.

In *L & N R. R. Co.* v. *Mottley*, 219 U. S. 467, at page 483, it was said:

> "After the commerce act came into effect no contract that was inconsistent with the regulations established by the Act of Congress could be enforced in any court. The rule upon this subject is thoroughly established."

To the same effect, see:

Federal Radio Commission v. *Nelson Bros. Bond and Mortgage Company*, 289 U. S. 266.

National Licorice Co. v. *National Labor Relations Board*, 309 U. S. 350.

Union Dry Goods Co. v. *Georgia Public Service Corporation*, 248 U. S. 372.

VI

The Case Is of Vital Public Importance

This case transcends in importance the effect of the decision upon the operation of petitioner's radio station and the public interest there involved.

It transcends in importance the effect of the decision upon the Federal Communications Commission and the dignity that is to be accorded to a decision of that body in the effective administration of the Communications Act.

The issues raised in this case go to the very foundation of the concept of administrative law. The ruling below, if allowed to stand, will not only destroy the power of the Federal Communications Commission to effectively control the business of radio broadcasting, as contemplated by the Congress, it will at the same time undermine the validity, dignity and effectiveness of all decisions and rulings of administrative agencies enforcing federal laws.

Conclusion

It is therefore respectfully submitted that the Writ of Certiorari should be granted and that the judgment of the Court of Appeals of Georgia should be reversed.

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APPENDIX A

Applicable sections of the Communications Act of 1934 (Chap. 5, Title 47, USCA) not quoted in the petition or brief:

"Sec. 307 (a). The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act."

"Sec. 308 (b). All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation."

"Sec. 309 (a). If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, of necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it

shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

"Sec. 310 (b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

"Sec. 402 (b). An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of any existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

"(3) By any radio operator whose license has been suspended by the Commission."

"Sec. 402 (c) Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commission. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of

the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application or order involved, and also a like copy of its decision thereon, and shall within thirty days thereafter file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise delivered a copy of said notice of appeal."

"Sec. 402 (d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party."

"Sec. 402 (e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing

the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 83

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,

Petitioner,

vs.

W. E. CARROLL, CLARENCE H. CALHOUN, MRS. HATTIE J. PICKARD, MRS. EMMA B. MOORE, AND SAM PICKARD, TRUSTEE FOR SAM PICKARD, JR.,

Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR PETITIONER

EUGENE COOK,
Attorney General of Georgia;
HAMILTON LOKEY,
Deputy Asst. Attorney General of Georgia,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Brief for petitioner	1
Introductory statement	1
Opinions below	2
Jurisdiction	2
Questions presented	3
Statutes involved	4
Statement of the Case	4
The Original Situation	4
First Proceedings Before the Commission	5
The Contract of April 15, 1943	6
Further Proceedings Before the Commission	6
The Action Taken by Petitioner	8
The Third Application for License Renewal	8
Proceedings in the Trial Court	9
The Judgment and Decree in the Trial Court	11
The Decision of the Court of Appeals of Georgia	12
Specification of errors to be urged	4
Summary of the argument	6
Argument	21
The judgment of the court below improperly fails to give effect to the determination of the Commission upon a matter clearly within its jurisdiction and invades the jurisdiction of the Commission in a field in which federal power is exclusive	21
The decision of the Commission regarding the effect of the contract upon the public interest in the operation of the radio station was binding upon the respondents although they were not formal parties to the second application of petitioner for license renewal	32

Page

The decision below, in giving effect to private contractual rights superior to and in conflict with the power of federal regulation under the Communications Act of 1934, was contrary to the prior decisions of this Court 38
Conclusion 44
Appendix A 45

STATUTES CITED AND TEXTS

Act of June 25, 1948 (Title 28, United States Code, Section 1257(3)) 2
Article VI of the United States Constitution 2, 3
Sections 307(a), 308(b), 309(a), 310(b) and 402(b), (c), (d) and (e) are set forth in Appendix 4
Sections 307(a), 308(b), 309(a) and 310(b), Communications Act of 1934 25
Columbia Law Review 855, 49 (June 1949) 29, 44
Restatement of Contracts, Par. 458 42

TABLE OF CASES CITED

Atchison, Topeka & Santa Fe Ry. v. *Scarlett*, 300 U. S. 471, 474 ..... 27, 37
American Brake Shoe & Foundry Co. v. *Pittsburgh Ry. Co.*, 270 Fed. 812 38
Berg, et al. v. *Cincinnati, Newport & C. R. R. Co.*, 56 Fed. Supp. 842 29
Black River Valley Broadcasts, Inc. v. *McNinch*, 101 Fed. (2nd) 235, 237 (C. A. D. C.) 25, 27, 32, 37
Central of Georgia Railway v. *Blount*, 238 Fed. 292 (CCA 5) 39, 41
Churchill Tabernacle v. *Federal Communications Commission*, 160 Fed. (2nd) 244 (C.A. D.C.) 22, 31, 35
Columbia Broadcasting System v. *United States*, 316 U. S. 407 ..... 22, 29
Cowley v. *Northern Pacific Ry. Co.* (Wash.) 123 Pac. 998 41
Federal Radio Commission v. *Nelson Bros. Bond & Mortgage Company*, 289 U. S. 266, 279 27
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137 ..... 22, 25

Page

Federal Land Bank v. *Shingler*, 174 Ga. 352, 361, 162 S. E. 815 ..... 30, 33
Federal Radio Commission v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 282 39
Glover v. *Mitchell*, 319 Mass. 1, 64 N. E. (2nd) 648 30
Hagens v. *United Fruit Company*, 135 Fed. (2nd) 842 (C.C.A. 2) 29
Harris v. *Central Nebraska Public Power & Irrigation District*, 29, Fed. Supp. 425 ..... 29, 37
Ingraham v. *Union Stockyards Co.*, 64 Fed. (2nd) 390 (C.C.A. 8) 29
L & N R. R. Co. v. *Mottley*, 219 U. S. 467, 482 ..... 40, 42
Manufacturers Ry. Co. v. *United States*, 246 U. S. 457 29
Malcomson v. *Wappoo Mills*, 88 Fed. 680 41
Maryland Casualty Co. v. *United States*, 251 U. S. 342, 349 29
McElheney v. *Jasper Trading Co.*, 12 Ga. App. 790, 78 S.E. 727 41
Mississippi Valley Barge Line Co. v. *United States, et al.*, 292 U. S. 282 29
Mondou v. *New York, N. H. & H. R. R. Co.*, 223 U. S. 1, 57 30
National Broadcasting Company v. *United States*, 316 U. S. 447 ..... 22, 25, 27
National Licorice Co. v. *National Labor Relations Board*, 309 U. S. 350 ..... 36, 37, 40
National Pavements Corp. of California v. *Hutchinson Co.*, 22 Pac. (2nd) 534 41
N. Y. Central & H. R. RR. Co. v. *Gray*, 239 U. S. 583 43
Operator's Oil Co. v. *Barbre*, 65 Fed. (2nd) 857, 862 41
Pabst Brewing Co. v. *Howard* (Mo.), 211 S.W. 720 42
Peckham v. *Industrial Securities Co.* (Del.), 113 Atl. 799 42
Pennsylvania Co. v. *United States*, 236 U. S. 351 29
Radio Station WOW v. *Johnson*, 326 U. S. 120 30
Red River Broadcasting Co., Inc. v. *Federal Communications Commission*, 98 Fed. (2nd) 282, 285 (C.A. D.C.) 29, 36, 37

Page

Regents of New Mexico College of A & M Arts v. *Albuquerque Broadcasting Co.*, 158 Fed. (2nd) 900, 905 (C.C.A. 10) 29

Rochester Telephone Corp. v. *United States, et al.*, 307 U. S. 125, 145 27

Ryan v. *KVL. Inc.*, 198 Wash. 459, 88 Pac. (2nd) 836 42

Seaboard Air Line Ry. Co. v. *Atlanta, B & C RR Co.*, 35 Fed. (2nd) 609 (CCA 5) (cert. denied 281 U. S. 737) 39

Southern Railway Company v. *State of Georgia*, 188 Ga. 569, 4 S.E. (2nd) 233 29

Taylor v. *Superior Motor Co.*, 227 N. C. 365, 42 S. E. (2nd) 460 30

Testa, et al. v. *Katt*, 330 U. S. 386, 394 30

The Macon & Birmingham Railroad Co. v. *Gibson*, 85 Ga. 1, 17, 11 S. E. 442 41

Union Dry Goods Co. v. *Georgia Public Service Commission*, 145 Ga. 658, 89 S. E. 779, affirmed 248 U. S. 372 ..... 37, 41

Venner v. *Michigan Central Railroad Company*, 271 U. S. 127 28

Yankee Network v. *Federal Communications Commission*, 107 Fed. (2nd) 212, 226 (C.A. D.C.) 27

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 83

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,

Petitioner,

vs.

W. E. CARROLL, CLARENCE H. CALHOUN, MRS. HATTIE J. PICKARD, MRS. EMMA B. MOORE, AND SAM PICKARD, TRUSTEE FOR SAM PICKARD, JR.,

Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR PETITIONER

Introductory Statement

This case is here on certiorari to review the judgment of the Court of Appeals of Georgia entered on October 27, 1948, affirming the judgment of the Superior Court of Fulton County, Georgia, in favor of the respondents and against petitioner (R. 138) and the judgment entered December 15,

1948, denying rehearing (R. 148). A petition for a writ of certiorari to the Supreme Court of Georgia was filed on January 9, 1949 (R. 149) and was denied on March 16, 1949 (R. 150).

Opinions Below

The judgment of the Superior Court of Fulton County, Georgia (R. 122) is unreported. The opinion of the Court of Appeals of Georgia of October 27, 1948 and the denial of the motion for rehearing (without opinion) on December 15, 1948 are reported in 78 Georgia Appeals Reports 292, 50 S. E. (2d) 808. The denial of the petition for certiorari to the Supreme Court of Georgia (without opinion) on March 16, 1949 is reported in 78 Georgia Appeals Reports 898.

Jurisdiction

The judgment of the Court of Appeals of Georgia, upon which rehearing was denied on December 15, 1948, and upon which a writ of certiorari to the Supreme Court of Georgia was denied, was entered March 16, 1949. Certiorari was granted by this Court on October 17, 1949. The jurisdiction of this Court is invoked under Section 1257(3) of the Judicial Code, as amended by the Act of June 25, 1948 (Title 28, United States Code, Section 1257(3)), on the ground that the decision below denied a title, right, privilege, and immunity claimed by petitioner under the Communications Act of 1934, particularly Sections 307(a), 308(b), 309(a), 310(b) and 402(b) thereof, and on the further ground that the judgment of the Court of Appeals of Georgia violates the provisions of Article VI of the Constitution of the United States.

Questions Presented

1. Whether a decision of the Federal Communications Commission, holding that a particular contract made between a radio station licensee and third parties adversely affects the ability of the radio station to properly function in the public interest, is a determination binding upon a state court under Article VI of the United States Constitution, or whether the state court may ignore that determination and rule to the contrary.

2. Whether a state court may substitute its judgment for that of the Federal Communications Commission as to the effect of such a contract upon the ability of a radio station to function in the public interest.

3. Whether a state court, by substituting its judgment for that of the Federal Communications Commission as to the effect of a particular contract upon the ability of the radio station to function in the public interest, collaterally attacks a decision of the Federal Communications Commission and invades the exclusive jurisdiction vested in the Federal Communications Commission under the provisions of the Communications Act of 1934, and amendments thereto, by annulling in legal effect, the orders of the Commission of September 19, 1945 and November 9, 1945.

4. Whether the decision below was contrary to the decisions of the Supreme Court of the United States construing the Communications Act of 1934, by giving effect to private contractual rights of parties superior to and in conflict with the power of federal regulation under the Communications Act of 1934.

Statutes Involved

Article VI of the Constitution of the United States provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The applicable sections of the Communications Act of 1934, as amended, to-wit: Sections 307(a), 308(b), 309(a), 310(b) and 402(b), (c), (d) and (e) are set forth in Appendix A (*infra*, pp. 44-47).

Statement of the Case

The decision and judgment of the Court of Appeals of Georgia herein complained of arises out of the following situation:

The Original Situation

Petitioner owns and operates Radio Station WGST, in the City of Atlanta, as a trust for and on behalf of the Georgia School of Technology. On June 18, 1936, petitioner entered into a management contract with Southern Broadcasting Stations, Inc. for a period ending January 6, 1950. Under the terms of the management contract Georgia Tech was receiving ten per cent of the gross receipts from the operation of the station. This was the situation on January 31, 1940 when the Georgia School of Technology filed its application for renewal of its broadcasting license with the Federal Communications Commission (hereinafter referred to as the Commission).

First Proceedings Before the Commission

Instead of renewing the station's license, the Commission challenged the propriety and legality of the further operation of Radio Station WGST by petitioner through Southern Broadcasting Stations, Inc. as being not in the public interest, and as being in contravention of the Federal Communications Act.

Southern Broadcasting Stations, Inc. thereupon intervened in the matter. After hearing, the Commission issued proposed findings of fact and conclusions of the Commission on March 23, 1943 (R. 33). The findings of fact and conclusions were extensive. In substance it was determined by the Commission that the station, under the contract with Southern Broadcasting Stations, Inc., was being operated in violation of the Federal Communications Act and that public interest, convenience and necessity would not be served by a renewal of license with the management contract in force. It was further determined that the failure to comply with the provisions of the Federal Communications Act was due to "misunderstanding and lack of knowledge rather than to bad faith on the part of" Georgia Tech, and it was provided that the Commission would consider a second application for renewal of license, provided assurance was given that the full responsibilities of a licensee would be assumed. It was directed that in the second application there should be set forth "the plan of the Station for the acquisition of the necessary facilities and equipment, and for the business management, representation, and control of its future operations . . ." On May 8th, 1943 the proposed findings and conclusions of March 23, 1943 were made the findings and conclusions of the Commission (R. 46).

The Contract of April 15, 1943

As a result of this action by the Commission, representatives of petitioner entered negotiations with representatives of respondents (the latter being all the stockholders of Southern Broadcasting Stations, Inc.). Out of these negotiations came the contract of April 15, 1943 which forms the basis for this suit (R. 12). By said contract petitioner acquired all the capital stock of Southern Broadcasting Stations, Inc., procured the transfer of all the assets of the corporation to petitioner, and thereafter, in July of 1943, dissolved the corporation by surrendering its charter in Fulton Superior Court. Under the terms of the contract of April 15, 1943, petitioner agreed to pay to Fulton National Bank, as agent of the respondents, as the purchase price of the capital stock of the corporation, fifteen per cent of the net billings (gross receipts) of Radio Station WGST "from the sale of time on the air for any and all types of broadcasting, visual or sound, including any and all revenues which may be derived from such sources as a result of any new developments in the broadcasting field" for a period of 80¾ months and until January 6, 1950.

Further Proceedings Before the Commission

Thereafter, on May 22, 1943, petitioner filed its second application for a renewal of its license. As an exhibit to the second application for license renewal petitioner attached a copy of the contract of April 15, 1943 as its plan for acquiring the necessary facilities and equipment of Southern Broadcasting Stations, Inc., including the business management, representation and control of the future operations of the station (R. 48). Petitioner requested the Commission to grant the license applied for without hearing (R. 55), but this was denied (R. 63).

Thereafter the matter was heard by the Commission. After consideration of the application and the testimony presented by petitioner, the Commission issued proposed findings of fact and conclusions of the Commission on September 19, 1945 (R. 64). In substance the Commission found "*that the arrangements under the contract of April 15, 1943 would jeopardize the licensee's financial ability to conduct the future operation of the station in the public interest, and that, therefore, public interest, convenience or necessity would not be served by a grant of the instant application*" (R. 70). As additional reasons for determining that public interest, convenience or necessity would not be served by granting the license to the station with the contract of April 15, 1943 in force, the Commission concluded that the payments of 15% of the gross income of the station would have the effect of hampering and restraining the station from entering the fields of Frequency Modulation and Television broadcasting (R. 70). The Commission further concluded that the arrangements under the contract of April 15, 1943 would amount to the respondents receiving indirectly what the Commission had determined by its orders of March 23rd and May 8th, 1943 could not be received directly by Southern Broadcasting Stations, Inc. because of violation of the Federal Communications Act. This, the Commission said, "would, in effect, condone such illegality and thwart the Commission's efforts to enforce the requirements of the Act" (R. 71).

By the order of September 19, 1945 the Commission determined that a granting of the second application for license renewal would not serve the public interest, convenience or necessity and should therefore be denied, but without prejudice to the filing of a further application by petitioner before December 18, 1945, "*provided it is affirmatively shown that no further effect is given to the agreements between the Georgia School of Technology and South-*

ern Broadcasting Stations, Inc., which the Commission has found in Docket 5903 [the proceedings on the first application for license renewal] *and in this proceeding to be contrary to the Communications Act and incompatible with the operation of the station in the public interest"* (R. 71).

The Action Taken by Petitioner

Upon receipt of the order of the Commission of September 19, 1945, petitioner made no further payments under the contract of April 15, 1943, and on October 11, 1945, the Board of Regents, the governing body of petitioner, passed the following resolution:

> "Resolved, by the Board of Regents of the University System of Georgia, that the ruling of the Federal Communications Commission having made the contract with the stockholders of Southern Broadcasting Stations, Inc. legally impossible of performance, the board hereby approves the action of its WGST Radio Committee in directing that said contract be not further complied with. This action is taken without prejudice to a fair adjustment or settlement of whatever rights the said stockholders may have, subject to the approval or consent of the Federal Communications Commission" (R. 72).

On November 9, 1945 the proposed findings of fact and conclusions of September 19, 1945 were adopted by the Commission as its findings of fact and conclusions upon the second application of petitioner for renewal of the license of Radio Station WGST (R. 72).

The Third Application for License Renewal

On December 4, 1945 petitioner filed its third application for license renewal. At the same time it filed an application for a construction permit. As an exhibit to both

applications it filed a statement affirmatively showing that no further effect was being given to the agreements condemned by the Commission (R. 79). Thereafter, on March 7, 1946, the application was granted and the license renewal was issued (R. 81).

From the time in 1940 when petitioner's previous license expired until the issuance of the license renewal on March 7, 1946, Station WGST continued operations under temporary licenses granted by the Commission. Since the issuance of the license of March 7, 1946 there has been another license renewal on May 1, 1947, which runs until May 1, 1950. The radio station is being currently operated under this license.

Proceedings in the Trial Court

From September 19, 1945 until June 18, 1947 the respondents took no action. They then filed suit in Fulton Superior Court for an accounting and for a judgment for 15% of the gross income from the operation of the station from August 1, 1945 to date of judgment (R. 9).

Petitioner filed its answer in which it admitted that prior to the decision of the Commission on September 19, 1945 it had paid under the contract the sum of $149,408.38. It admitted the execution of the contract of April 15, 1943 and admitted a prima facie case on behalf of the respondents. Further answering it set up as an affirmative defense the actions of the Commission and petitioner as heretofore outlined in this statement of facts (R. 17-23). By amendment petitioner showed that, according to its books and records, 15% of the net billings (gross income) of Radio Station WGST, from August 1, 1945 through August 31, 1947 amounted to the sum of $144,968.63 (R. 85).

By agreement of all parties, all matters of law and fact were submitted to the trial court, sitting without the intervention of a jury. The case was tried upon an agreed statement of facts, stipulations of the parties and certain docu-

mentary evidence introduced without objection. Evidence was introduced in support of the statement of facts heretofore set out.

In addition it was stipulated between the parties that Southern Broadcasting Stations, Inc., which was owned by respondents prior to April 15, 1943, was a party as intervenor to the proceedings before the Commission which resulted in the proposed findings of fact and conclusions of the Commission of March 23, 1943, whereby the first application of petitioner for license renewal was denied. These proceedings were designated by the Commission as Docket Number 5903 (R. 94).

It was further stipulated that respondents had *actual knowledge* of the filing by petitioner of the second application for renewal of license and which was designated by the Commission as Docket Number 6534; that respondents had *actual notice* of the order of the Commission, dated October 12, 1943, assigning the matter for hearing; that respondents had *actual knowledge* of the hearing before the Commission and of the proposed decision of September 19, 1945; that respondents also had *actual knowledge* of the final order of the Commission, dated November 9, 1945, wherein petitioner's second application for license renewal was denied; and that the respondents had actual knowledge of such matters *at the times said matters were taking place* (R. 94).

Evidence was introduced to show that under the law and the rules of the Commission respondents had the right at any time to intervene in the proceedings on the second application for license renewal, just as Southern Broadcasting Stations, Inc. had intervened in the proceedings on the first application; that the right of intervention existed after, as well as before, the ruling of the Commission on the second application; and that respondents had the same right of statutory appeal as petitioner from the denial by the Com-

mission of the second application for license renewal (R. 97).

It was stipulated by the parties that at the time the respondents entered into the contract of April 15, 1943 with petitioner they knew that the operation of Radio Station WGST depended upon a license so to operate from the Commission and that said operation was subject to Federal regulation and control under the Communications Act of 1934, as administered by the Commission (R. 95).

And it was stipulated that *the respondents also knew that under the Communications Act of 1934 the Commission had jurisdiction over any contract or agreement affecting the operation of a radio station in the public interest or affecting the present or future financial ability of a radio station to operate in the public interest* (R. 95).

It was likewise stipulated that in the hearing before the Commission based upon the notice of such, dated October 12, 1934 (the hearing on the second application for license renewal) the evidence as to the value of the equipment of the radio station acquired by the petitioner from the respondents or Southern Broadcasting Stations, Inc. ranged between $40,000.00 and $70,000.00 and that at that time, which was in 1943, such equipment was very difficult, if not impossible, to acquire (R. 95).

It was also stipulated that the license under which Radio Station WGST was operating in April of 1943 was a temporary license and extension of its prior license, and that said license and extension of said license had expired (R. 96).

The Judgment and Decree in the Trial Court

At the conclusion of the evidence, and after hearing oral argument, the Court took the matter under advisement, and thereafter, on October 6, 1947, passed a preliminary

order and decree finding *that the Commission was without jurisdiction to nullify, change or anywise modify the duties and obligations of the parties to the contract of April 15, 1943, that the action of the Commission did not constitute a valid defense or bar as a matter of fact or law to the rights of the respondents to enforce the provisions of the contract, that said actions did not render further performance of the contract by petitioner impossible,* that respondents were entitled to an equitable accounting, and that they were entitled to a decree in this case ordering petitioner to pay to them 15% of the gross income of the station from August 1, 1945 to September 1, 1947 (R. 108). Thereafter on October 10, 1947, a final order, judgment and decree was entered in favor of the respondents and against petitioner in accordance with the preliminary order of October 6, 1947 (R. 122).

The Decision of the Court of Appeals of Georgia

Petitioner brought the case to the Court of Appeals of Georgia, which court affirmed the judgment of the trial court. In the course of its opinion the Court of Appeals of Georgia held:

> ". . . but nothing in the power granted to the Commission, or in said communications act of Congress, gives to the commission the power and authority to regulate the private contracts and business of those operating radio-broadcasting stations, where the same is not necessary in the protection of the public interest, and where such contracts do not affect the interstate transactions of the radio station" (R. 127).

> "It does not appear that the subject matter of the contract was affected with such a public interest as to justify the same to be nullified by the order of a governmental agency, charged by act of Congress under the authority of the commerce clause of the Constitution with the power to license radio-broadcasting stations,

and to regulate their interstate transactions, . . ." (R. 136).

"It cannot be anticipated that the contract sued on, insofar as it related to the payment of the agreed purchase-price of this stock and of the assets of the corporation, giving to the regents complete control of the radio station and its operation, would so far affect the financial ability of the radio station as to render the station unable to operate in the public interest. The evidence fails to show that the contract would affect the public interest in reference to the broadcasts of this station" (R. 137).

". . . it not appearing that the payment of such purchase-price would render the radio station unable to operate in the public interest . . ." (R. 137).

"Judge Almand [the trial judge] denied the contentions of the defendant as to the legal impossibility of performing the contract sued on by reason of an act of law, and that the Regents were therefore excused from performance; and ruled that the Federal Communications Commission was without power to take any action which would have the effect of nullifying, changing, or in any wise modifying the duties and obligations of the parties to said contract thereunder, . . ." (R. 130).

"Taking the above view, the other contentions of the regents are necessarily to be determined adversely to the regents and are controlled thereby, and the trial judge's ruling and judgment excepted to were not erroneous for any of the reasons assigned" (R. 138).

Specification of Errors to Be Urged

The Court of Appeals of Georgia erred:

(1) In failing to give effect to the determination of the Communications Commission that the contract in controversy adversely affects the ability of the radio station to function in the public interest.

(2) In determining that the contract does not affect the ability of the radio station to function in the public interest when the Communications Commission, the agency designated by the Congress to decide such questions, has determined, after full hearing, exactly the contrary.

(3) In substituting its judgment for that of the Commission in regard to a matter of both public and private concern and as to which the Congress has vested exclusive jurisdiction in the Commission and has provided that its determination is binding and conclusive unless and until reversed on appeal as provided by statute.

(4) In collaterally attacking the decision of the Commission upon the matter in violation of Article VI of the United States Constitution.

(5) In nullifying, by its decision, the prior decisions of the Communications Commission relative to the contract in controversy, and in effect requiring petitioner to specifically perform a contract which the Commission has declared cannot be performed consistent with the public interest.

(6) In its opinion of October 7, 1948 by holding "The evidence fails to show that the contract would affect the public interest in reference to the broadcasts of this station" (R. 137) and by holding ". . . it not appearing that the payment of such purchase-price would render the radio station unable to operate in the public interest . . ." (R. 137).

(7) In failing to recognize and respect the principle enunciated by this Court that the right of private contract must give way to the exigencies of the public welfare when determined in an appropriate manner by proper authority, and the further principle that those who contract with reference to the business of radio broadcasting have no rights superior to the exercise of the power of federal regulation under the Communications Act of 1934.

(8) In failing to give effect to the determination of the Commission condemning the contract as contrary to the public interest and adjusting the rights of the parties thereto in the light of that determination.

(9) In ruling that the Commission "was without power to take any action which would have the effect of nullifying, changing or in any wise modifying the duties and obligations of the parties to said contract . . ." (R. 130, 138).

(10) In failing, because of the foregoing, to sustain the defense of petitioner to the suit.

(11) In depriving petitioner, through the foregoing, of the rights, privileges and immunities vested in it under the Communications Act of 1934.

Summary of the Argument

I. The judgment of the court below improperly fails to give effect to the determination of the Commission upon a matter clearly within its jurisdiction and invades the jurisdiction of the Commission in a field in which federal power is exclusive.

(a) The court below has decided issues of public as well as private concern over which the Communications Commission has been vested by Congress with exclusive jurisdiction. The determination as to the public interest involved in the grant of a radio station license, including the effect of a licensee's contract upon his ability to operate in the public interest, is a matter over which the Commission has sole jurisdiction under Section 308(b) of the Communications Act.

(b) The Commission, after extensive hearings, had determined that the contract in controversy adversely affected the ability of the station to properly function in the public interest. There was ample evidence before the Commission upon which to predicate its determination that the contract was contrary to the public interest and violative of the provisions of the Communications Act. The Commission did not pass upon the validity of the contract as measured by the law of contracts *per se*, but rather determined in a licensing proceeding that the burdens of the contract would adversely affect the operation of the station in the public interest and would be a continuing means of violating the provisions of the Communications Act. In so doing the Commission was complying with its congressional mandate to see to it that the people of the United States have the best possible radio service.

(c) The Court below improperly failed to give effect to the determination of the Commission that the contract ad-

versely affected the ability of the radio station to function in the public interest and instead reached the exactly opposite conclusion. In short, the lower court substituted its own judgment for that of the expert body created by Congress to determine such matters.

(d) The ruling of the court below collaterally attacks the decision of the Commission in violation of Article VI of the Constitution. The decision of the Commission, lawfully made by it under authority granted by Congress, becomes part of the supreme law of the land, and as such must be respected by the courts of Georgia, and a state court is without power to ignore that decision, or substitute another decision for it. If the federal administrative scheme is to work in the highly complex and competitive field of radio, the decisions of the administrative body must be given effect by the courts.

II. The decision of the Commission regarding the effect of the contract upon the public interest in the operation of the radio station was binding upon the respondents although they were not formal parties to the second application for license renewal.

(a) The corporation owned by respondents was a party by intervention to the hearings upon the first application for license renewal. The decision of the Commission denied the license and condemned the arrangement under which the station was managed by respondents' corporation as contrary to the public interest and in violation of the Communications Act. No appeal was taken from the decision of the Commission and it was binding alike upon the management company and petitioner.

(b) The contract with respondents was made as a result of the decision of the Commission on the first application for license renewal and in an effort to comply with that

decision. Clearly the parties intended to contract with relation to the provisions of the Communications Act.

(c) Respondents had actual notice and actual knowledge of the hearing before the Commission resulting in the condemnation of the contract as contrary to the public interest. They had actual knowledge of the decision of the Commission in regard thereto. These facts are stipulated in the record. It is also clear from the record that respondents were notified more than a month prior to the time that the Commission's decision became final that petitioner would not carry the litigation further.

(d) Respondents as aggrieved parties whose interests were adversely affected by the decision of the Commission denying the renewal of license and condemning the contract as contrary to the public interest had the same right of statutory appeal under Sec. 402(b) of the Communications Act as did petitioner. Respondents had the right to intervene at any time before the Commission, either before or after its decision. They had the right to appeal the Commission's decision as provided by the Act, even though there was no intervention before the Commission. They did not intervene and no appeal was taken, although respondents had ample time to do either after notice from petitioner that it did not intend to appeal. As interested parties it was their responsibility to be alert to protect their interests. Failing to do so, they cannot now be heard to complain that the ruling of the Commission does not affect them because they were not formal parties to the proceedings. The Commission's decision is now final and binding upon petitioner and respondents alike.

III. The decision below, in giving effect to private contractual rights superior to and in conflict with the power of federal regulation under the Communications Act of 1934, was contrary to the prior decisions of this Court.

(a) Those who contract with regard to radio broadcasting necessarily do so subject to the paramount right of federal regulation. This must be so if the federal regulatory scheme is to be maintained as a vital and effective instrument "to secure the maximum benefits of radio to all the people of the United States". Radio broadcasting is peculiarly interstate in character and this Court has frequently observed that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing contractual arrangements which would conflict with the execution of its policy for the good of the people as a whole.

(b) Private contractual rights in the field of radio must yield to the exigencies of the public welfare when determined in an appropriate manner by the proper administrative agency. When the public interest is involved there arises a limitation upon the absolute freedom of contract. To the extent that a contract conflicts with the declared public interest the courts will decline to enforce it. This is none the less so because the recognition of this principle may diminish or even destroy the value of the offending contract. Such contracts must necessarily be regarded as having been made subject to the possibility that regulation in the public interest may render them unenforceable or impair their value.

(c) The determination of the rights of the parties must be made in the light of and with reference to the decision of the Commission. The Commission's decision that the contract was inconsistent with the operation of the station

in the public interest was binding upon petitioner and respondents alike and not subject to collateral attack. Nor can that decision be set at naught by a decree in the state court which in effect directs petitioner to do the very thing which the Commission has expressly forbidden it to do. Further performance of the contract is therefore impossible and thus legally excused. But the respondents are not remediless. They have their relief in the equities of the situaiton and are entitled to receive, not the strict measure of consideration called for by the contract itself, for that would violate the declared public interest, but the fair value, the reasonable value of what petitioner received from them. This determinaiton of fair value has never been made by any court.

ARGUMENT

This case presents a conflict between the authority and jurisdiction of the Federal Communications Commission, under the Communications Act of 1934, and the authority and jurisdiction of the Georgia State Courts, with respect to the binding effect of a determination by the Commission that a particular contract adversely affects the ability of a radio station to function in the public interest. It squarely raises the question whether, in a suit in the state courts upon that contract, the state courts are free to determine, contrary to the finding of the Commission, that the contract does not affect the ability of the radio station to function in the public interest, and give damages for its breach, or whether the state courts are bound by the determination of the Commission and must adjust the rights of the parties in the light of that determination.

I

The judgment of the court below improperly fails to give effect to the determination of the Commission upon a matter clearly within its jurisdiction and invades the jurisdiction of the Commission in a field in which federal power is exclusive.

(a) *The court below has decided issues of public as well as private concern, over which the Communications Commission has been vested by Congress with exclusive jurisdiction.* This case does not involve the preservation of the delicate balance between federal and state power. The court below, at the outset, recognizes the power of the Commission over the grant of radio licenses in the public interest and jurisdiction to pass upon a contract affecting the ability of a radio station to so operate in the public interest. It then concludes that "The evidence fails to show that the contract would affect the public interest in reference to

the broadcasts of this station" (R. 137). The court further concluded that it did not appear "that the payment of such purchase price would render the radio station unable to operate in the public interest. . . ." (R. 137). The actions of petitioner before the Commission and the Commission's decisions were pleaded (R. 18-84), and introduced in evidence in the trial court (R. 89-94). The court below ignored the decisions of the Commission in order to give effect to the private contractual claims of the respondents.

The conclusions reached by the state court, we submit, clearly involve judgments on issues in which the public as well as the contracting parties were interested and over which the Federal Communications Commission had exclusive jurisdiction under Sec. 308(b) of the Communications Act, insofar as the burdens of the contract affected the ability of the station to function in the public interest.

In granting a license, or renewal of license, the Commission is charged with the responsibility of investigating all factors and all matters, financial and otherwise, bearing upon the ability of a radio station to function in the public interest. *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 475. The authority of the Commission to pass upon issues relating to the public interest raised by contracts between licensees and third persons is put beyond question by the decisions of this Court in the Networks Cases, *Columbia Broadcasting System* v. *United States*, 316 U. S. 407; *National Broadcasting Company* v. *United States*, 316 U. S. 447; and *National Broadcasting Company, et al.* v. *United States*, 319 U. S. 190.[1]

(b) *The Commission, after extensive hearings, had determined that the contract in controversy adversely affected the ability of the station to properly function in the public*

[1] See also: *Churchill Tabernacle* v. *Federal Communications Commission*, 160 Fed. (2nd) 244 (C.A. D.C.).

interest. Pursuant to its statutory duty the Commission made inquiry into the application for renewal of license filed by petitioner on January 31, 1940. After hearing it determined that the station was being illegally operated under a management contract whereby petitioner had abdicated its duties and responsibilities as a licensee. License renewal was denied, but petitioner was permitted to file a second application for renewal, at which time it was required to show that it had resumed complete control and management of the operations of the station and that it would thereafter assume the full responsibilities of a licensee and operate in conformity with the Communications Act. In an effort to comply with this decision of the Commission, the contract in controversy was made. It was the solution proposed by the parties whereby the old management set-up would be completely eliminated and future operations would be in conformity to the Act. Predicated upon the contract the second application for license renewal was made. After a full hearing the Commission determined that the contract of April 15, 1943 placed such financial burdens upon the station that it could not properly function in the public interest, and that its future operation in the public interest was seriously jeopardized (R. 70). The Commission had additional objections to the operation of the station with the contract in effect. It felt that the burdens of the contract would hamper the station in its expansion into the fields of FM and Television broadcasting (R. 70). It also challenged the contract on the ground that it was an effort to condone a previous illegal arrangement condemned by the Commission and would be a continuing means of violating the provisions of the Communications Act (R. 70). In the light of these findings the Commission concluded that the grant of a license to petitioner with the contract in force would not be in the pub-

lic interest and denied the application (R. 71).[2] It can hardly be disputed that the action of the Commission was within the plenary authority granted it by the Congress to protect, promote and decide all questions affecting the public interest in the field of radio broadcasting. The Commission did not attempt to pass upon the validity of the contract as measured by the law of contracts *per se*, but rather it concerned itself in a licensing proceeding with the effect of the contract upon the financial ability of the station to operate in the public interest, its effect upon the ability of the station to expand into new fields of broadcasting in the public interest and its effect upon the efforts of the Commission to enforce the provisions of the Communications Act. In so doing the Commission was complying with its

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[2] The findings and decision of the Commission were as follows:

"4. In view of the foregoing, the Commission concludes that the arrangements under the contract of April 15, 1943, would jeopardize the licensee's financial ability to conduct the future operation of the station in the public interest and that, therefore, public interest, convenience or necessity would not be served by a grant of the instant application.

"5. There are additional reasons why under the arrangements made in the contract of April 15, 1943, public interest, convenience or necessity would not be served by a grant of this application. The assumption by the applicant of a burden amounting to 15% of its gross income resulting not only from the operations of Station WGST but from all new broadcasting developments, including FM and television, would have the effect of restraining the licensee from entering the field of FM and television broadcasting. Such a restraint does not appear to be in the public interest.

"6. Moreover, it seems clear that the payments of 15% of the gross income represent an effort on the part of the parties to give further effect to the agreement by which control of Station WGST had been illegally transferred to Southern Broadcasting Stations, Inc. As pointed out, these payments are to continue to January 6, 1950, the date when the 1936 agreement would have expired if that contract had not been terminated. Southern Broadcasting Stations, Inc. asserts ownership to the equipment of WGST, which has an estimated value of $50,000, but its title has been questioned. Aside from that, it does not now have and never has had any legal interest in the operation of the station. Accordingly, the payments provided for in the contract of April 15, 1943, and estimated on the basis of the station's present operations to total over $300,000 represent a payment to Southern Broadcasting Stations, Inc. far

mandate from Congress to see to it that the people of the United States "have the best possible radio service." *Black River Valley Broadcasts, Inc.* v. *McNinch*, 101 Fed. (2nd) 235, 237 (C. A. D. C.) [3]

(c) *The court below improperly failed to give effect to the determination of the Commission that the contract adversely affected the ability of the radio station to function in the public interest and instead reached the exactly opposite conclusion.* Without conducting any hearing upon the subject, and with no evidence before it except the contract itself and the record of the proceedings before the Commission, including the decisions of the Commission, the court below made a determination that the contract *did not* affect the ability of the station to function in the public interest, a determination completely contrary to that reached by the Commission.

The state court's ruling that "It does not appear that the subject-matter of the contract was affected with such a pub-

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in excess of that Corporation's legal interest, if any, in WGST. A grant of the renewal application under circumstances where a party to an arrangement found by the Commission to be in contravention of law would continue to profit from such arrangement would not be in the public interest since it would, in effect, condone such illegality and thwart the Commission's efforts to enforce the requirements of the Act.

"7. Therefore, the Commission concludes that a granting of this application of the Georgia School of Technology for renewal of the license of Radio Station WGST would not serve the public interest, convenience or necessity. The application, therefore, should be denied, without prejudice, however, to the submission within ninety days by the Georgia School of Technology of a new application for a construction permit and license to operate on the same frequency, provided it is affirmatively shown that no further effect is given to the agreements between the Georgia School of Technology and Southern Broadcasting Stations, Inc., which the Commission has found in Docket 5903 and in this proceeding to be contrary to the Communications Act and incompatible with the operation of the station in the public interest."

[3] See: Sections 307(a), 308(b), 309(a) and 310(b), Communications Act of 1934; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137; *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 217.

lic interest as to justify the same to be nullified by the order of a governmental agency, charged by act of Congress . . . with the power to license radio broadcasting stations, and to regulate their interstate transactions . . ." (R. 136) is all the more remarkable when it is seen from the record that:

1. It was stipulated that without a license from the Commission the radio station could not be lawfully operated (R. 90).

2. It was stipulated that at the time respondents entered into the contract of April 15, 1943 with petitioner they knew that the operation of Radio Station WGST depended upon a license so to operate from the Commission and that said operation was subject to federal regulation and control under the Communications Act of 1934, as administered by the Commission (R. 95).

3. It was stipulated that respondents also knew that under the Communications Act of 1934 the Commission had jurisdiction *over any contract or agreement affecting the operation of a radio station in the public interest or affecting the present or future financial ability of a radio station to operate in the public interest* (R. 95).

4. The Commission, after hearing, specifically found that *this contract had that very effect* (R. 70).

(d) *The ruling of the court below collaterally attacks the decision of the Commission in violation of Article VI of the Constitution.* A decision of the Commission made pursuant to its statutory duty and clearly within the jurisdiction conferred upon it by Act of Congress cannot be collaterally attacked in the courts of Georgia. Nor can the state courts substitute their judgment for that of the Commission as to what adversely affects the ability of a radio station to function in the public interest. A statutory method of

appeal is provided by the Communications Act (Sec. 402(b), (c), (d), and (e)), and it is the *only* method by which a ruling of the Commission can be reversed or set aside. "The judgment of the trial court and jury cannot be substituted for that of the Commission." *Atchison, Topeka & Sante Fe Ry.* v. *Scarlett*, 300 U. S. 471, 474.

Under our increasingly complex system, administrative agencies, with their specialized knowledge and expert approach, necessarily sprang up. In a rapidly expanding and highly competitive field like radio it was imperative that there be one expert body, acting under one law for all the states, to assure the listening public the maximum of broadcasting service.[4] In the administrative scheme, adequate provision is made for hearing and appeal by all interested parties. If the administrative scheme is to work, the decisions of the administrative body must be given effect by the courts. So long as they are supported by evidence such decisions are, and should be, conclusive. "So long as there is warrant in the record for the judgment of the expert body it must stand." *Rochester Telephone Corp.* v. *United States, et al.*, 307 U. S. 125, 145.[5]

Upon the question of the finality of an order of the Communications Commission, and its freedom from collateral attack, the decision of the Court of Appeals of the District of Columbia in *Black River Valley Broadcasts, Inc.* v. *McNinch, et al.*, 101 Fed. (2nd) 235 (C. A. D. C.) at page 237, is most illuminating:

> "The Commission is an administrative agency set up by Congress to determine under statutory direction the rights of the people of the United States to have

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[4] Cf: *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Company*, 289 U. S. 266, 279; *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 217.

[5] See also: *Yankee Network* v. *Federal Communications Commission*, 107 Fed. (2nd) 212, 226 (C.A. D.C.).

the best possible radio service. The interest, convenience, and necessity of the public is an essential test for the privilege of operating a radio station. This determination is, by the Act of 1934, lodged in the Commission. It is the only proper agency to decide these public questions, and its findings, under the law, must be maintained if they are not arbitrary or capricious, or erroneous in law, and are based upon substantial evidence. Federal Radio Commission *v.* Nelson Bros. Bond & Mortgage Co., 289 U. S. 266, 53 S. Ct. 627, 77 L. Ed. 1166.

"In the Act, Congress has made this Court the sole appellate body (with right to petition for certiorari to the Supreme Court) whereby the action of the Commission can be tested and has provided that any party aggrieved may have its rights reviewed here. It is well settled that the exclusive remedy provided by the statute to test the Commission's action is vested in this court by appeal, from which it follows that other courts do not grant equitable relief in such cases."

In related fields it is equally well settled that the determination of a federal agency may not be collaterally attacked but may be challenged only in the appropriate review proceedings established by law. In *Venner* v. *Michigan Central Railroad Company*, 271 U. S. 127, it was specifically held that a state court is without jurisdiction to pass on the validity of an order of the Interstate Commerce Commission in a suit by a stockholder against a railroad to enjoin it from carrying out an agreement, the performance of which was authorized by the Interstate Commerce Commission. In holding that such a suit invaded the exclusive jurisdiction of the Commission the court said (page 130):

"We agree with the court below that the suit is essentially one to annul or set aside the order of the Commission. While the amended bill does not expressly pray that the order be annulled or set aside, it does assail the validity of the order and pray that the de-

fendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside."

The converse situation is presented here. The judgment of the court below is equivalent to an order to specifically perform what the Commission has been equally specific in saying the petitioner should not perform if it is to operate in the public interest. It is the clearest kind of collateral attack.[6]

The decision of the Commission, lawfully made by it under authority granted by Congress, becomes part of the supreme law of the land, which, under Article VI of the Constitution, is entitled to the same respect and dignity accorded to federal law, and the state courts of Georgia are without power to ignore that decision, or substitute another decision for it.[7] To do so violates the provisions of Article VI of the Constitution, and it makes no difference that the state court expresses a contrary policy. When Congress, in the

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[6] To the same effect, see: *Pennsylvania Co.* v. *United States*, 236 U.S. 351; *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457; *Mississippi Valley Barge Line Co.* v. *United States, et al.*, 292 U.S. 282; *Hagens* v. *United Fruit Company*, 135 Fed. (2nd) 842 (C.C.A. 2); *Ingraham* v. *Union Stockyards Co.*, 64 Fed. (2nd) 390 (C.C.A. 8); *Berg, et al.* v. *Cincinnati, Newport & C. R. R. Co.*, 56 Fed. Supp. 842; *Harris* v. *Central Nebraska Public Power & Irrigation District*, 29 Fed. Supp. 425; *Southern Railway Company* v. *State of Georgia*, 188 Ga. 569, 4 S.E. (2d) 232; Note, 49 Columbia Law Review 855, 856 (June 1949).

[7] It has been recognized that the decisions of the Commission are to be accorded the same effect as rules and regulations laid down by it in the exercise of its statutory authority. *Regents of New Mexico College of A & M Arts* v. *Albuquerque Broadcasting Co.*, 158 Fed. (2nd) 900, 905 (C.C.A. 10). And it is well settled that the rules and regulations promulgated by the Commission, pursuant to its statutory authority, have the force and effect of Federal law. *Maryland Casualty Co.* v. *United States*, 251 U.S. 342, 349; *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 418; *Regents of New Mexico College of A & M Arts* v. *Albuquerque Broadcasting Co.*, 158 Fed. (2nd) 900, 906; *Red River Broadcasting Co., Inc.* v. *Federal Communications Commission*, 98 Fed. (2nd) 282, 285 (C.A. D.C.).

exercise of power confided to it by the Constitution, enacts legislation, it does so for all the people of all the states, and thereby establishes a policy for all. That policy is as much the policy of Georgia as if the enactment had come from the Georgia Legislature, and should be respected accordingly in the courts of that state. *Mondou* v. *New York, N. H. & H. R. R. Co.*, 223 U. S. 1, 57.[8]

It was the position of the respondents in the court below, and in their brief in opposition to the petition for certiorari, that the Commission was without power to take any action which would have the effect of nullifying, changing or in any way modifying the duties and obligations of the parties to the contract of April 15, 1943. In support of their contention they have relied upon the decision of this Court in *Radio Station WOW* v. *Johnson*, 326 U. S. 120. We submit that they have misconceived the bearing of that decision upon the instant case. In the *WOW* case, the matters which were adjudicated by the Supreme Court of Nebraska, including the issue of constructive fraud, had never been before the Commission and were never the subject of any findings or conclusions by the Commission with respect to the public interest. There is thus nothing in the facts or holdings of the case to support a conclusion that a state court has authority to disregard findings and conclusions of the Commission, relative to the public interest, in subsequent proceeding in the state courts. What the *WOW* case does hold is that the state courts are not deprived of authority to deal with innumerable issues of private law which may arise in connection with the operation of a radio station, merely because radio stations and licensees of such stations may be involved. But this obvious

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[8] See also: *Testa, et al.* v. *Katt*, 330 U.S. 386, 394; *Glover* v. *Mitchell*, 319 Mass. 1, 64 N. E. (2nd) 648; *Taylor* v. *Superior Motor Co.*, 227 N. C. 365, 42 S. E. (2nd) 460; *Federal Land Bank* v. *Shingler*, 174 Ga. 352, 361, 162 S. E. 815.

conclusion certainly lends no support to any further conclusion that where the Commission in the exercise of its authority under the Communications Act *does* make findings as to the public interest with respect to contractual and other relationships between licensees and third parties, the state courts are free to disregard those findings. Indeed, in the *WOW* case itself, this Court, while holding that the Nebraska court could properly deal with the issue of constructive fraud there involved, at the same time held that the state court must so frame its decree as not to encroach upon the jurisdiction of the Commission.

In its brief in opposition to the petition for certiorari respondents attach, as an appendix, a portion of the brief of the Commission filed in the Court of Appeals of the District of Columbia in the case of *Churchill Tabernacle* v. *Federal Communications Commission*, 160 Fed. (2nd) 244. They contend that the position of the Commission in that case is "squarely in line" with their position in this case. However, neither the Commission's brief nor the holding of the Court of Appeals affords any support to respondents here. The discussion in the portion of the brief cited by respondents is clear on its face that it has reference to portions of the contract involved in the *Churchill* proceedings relating to provisions for the payment of money and reversion of physical properties in the event of non-payment, *as to which the Commission made no conclusions as to the public interest in its decision.* One of the grounds for the partial remand in the *Churchill* case was that the order of the Commission in effect required the abrogation of the entire contract although no findings were made that all features of the contract were contrary to the public interest. In the present case, there is no room for any contention that the Commission's decision did not make findings as to the public interest with respect to all features of the contract which were involved in the proceedings

below. It is in any event clear that the respondents had available an opportunity to raise all issues as to the adequacy of the Commission's findings and the possible effect on respondents' interest under the contract before the Commission itself and before the Court of Appeals of the District of Columbia under Sec. 402(b) of the Communications Act. They did not avail themselves of the opportunity, but chose to raise the issue collaterally in the Georgia State courts. This they cannot legally do.[9]

II

The decision of the Commission regarding the effect of the contract upon the public interest in the operation of the radio station was binding upon the respondents although they were not formal parties to the second application of petitioner for license renewal.

The trial judge seems to have given considerable weight to the fact that the respondents were not parties to the hearing before the Commission on the second application for license renewal. He made this the subject of a separate finding of fact (R. 109), and apparently this played a part in his determination that the Commission had no jurisdiction to affect in any wise the contract between petitioner and respondents. The Court of Appeals of Georgia likewise took note of this fact (R. 131) although it further noted that the respondents had knowledge of the proceedings. Before considering the legal aspects of the proposition let us review the facts.

(a) *The corporation owned by respondents was a party by intervention to the hearing upon the first application for license renewal.* When the Commission declined to re-

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[9] *Black River Valley Broadcasts, Inc.* v. *McNinch*, 101 Fed. (2nd) 235 (C.A. D.C.).

new the station license of petitioner upon its first application, the management company, Southern Broadcasting Stations, Inc., intervened. It participated in the hearing, and one of the respondents here, Clarence H. Calhoun, Esq., appeared as counsel for the management company before the Commission (R. 33). The decision of the Commission condemned the arrangement under which Southern was operating the station as being contrary to the public interest and in violation of the Communications Act and denied the application for license renewal unless the management company were wholly eliminated from the set-up. No argument would seem to be necessary to establish that the decision of the Commission was binding upon the management company as well as upon petitioner. No appeal was taken from this decision.

(b) *The contract with respondents was made as a result of the decision of the Commission on the first application for license renewal and in an effort to comply with that decision.* It was attached as an exhibit to the second application for license renewal as petitioner's plan to obtain the necessary equipment, management and control of the future operation of the station. The parties to the contract knew that they were dealing upon a subject controlled by federal law, and the legal principle is clear that they are presumed to intend to contract with reference to the provisions of that law.[10]

(c) *Respondents had actual notice and actual knowledge of the hearing before the Commission resulting in the condemnation of the contract as contrary to the public interest and actual knowledge of the decision of the Commission in*

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[10] See: *Federal Land Bank* v. *Shingler*, 174 Ga. 352, 361, 162 S. E. 815, where it is held: ". . . it is an established principle that parties dealing upon a subject controlled by a Federal law are presumed to intend to contract with reference to the provisions of that law."

regard thereto. It was stipulated that the respondents had actual knowledge of the filing of the second application for license renewal, of the order of the Commission assigning the matter for hearing, of the hearing before the Commission, of the proposed decision of the Commission of September 19, 1945 and of the final order of the Commission of November 9, 1945 denying the second application (R. 94). It was further stipulated that the respondents had actual knowledge of these matters at the times they were taking place (R. 95).

While these stipulations would appear to be controlling and conclusive, an examination of the record discloses an even stronger case for the proposition that the Commission's ruling is binding upon respondents, although they were not formal parties to the hearing on the second application. It has already been shown that one of the respondents appeared before the Commission as attorney for the management company on the first hearing for license renewal. The record discloses that this respondent, Mr. Calhoun, was fully familiar and conversant with Commission procedure, including matters of appeal. In the trial court respondents introduced in evidence letters from Mr. Calhoun to Mr. Marion Smith, Chairman of the Board of Regents, in which Mr. Calhoun suggested procedures for requesting rehearing and for appealing the proposed decision of the Commission of September 19, 1945 (R. 103). In his letter of September 28, 1945, Mr. Calhoun says:

> "I must apologize, of course, for suggesting the sort of argument to be used but I am moved to do this upon advice of competent authority, well-skilled in procedure, the acts and doings of the Commission." (R. 105).

Respondents also introduced in evidence the reply of Mr. Smith to Mr. Calhoun advising that petitioner felt it could not carry the litigation further. *This letter from Mr.*

Smith was written over a month prior to the final decision of the Commission on the second application (R. 106).

(d) *Respondents as aggrieved parties whose interests were adversely affected by the decision of the Commission denying the renewal of license and condemning the contract as contrary to the public interest had the same right of statutory appeal under Sec. 402(b) of the Communications Act as did petitioner.* The guarantees of due process under the Constitution are amply provided for by the terms of the Communications Act and the rules of the Commission which permit intervention by an interested party and appeal by any person aggrieved or whose interests are adversely affected by a decision of the Commission.[11] Under the law and the rules of the Commission the respondents were persons interested in the decision, and adversely affected thereby, and they had the right to intervene at any time before the Commission decision. They had the further right to seek rehearing and reconsideration of the decision. They also had the same right of appeal to the Court of Appeals of the District of Columbia as petitioner had. Respondents did not intervene and no appeal was taken, although they had ample time to do either after notice from petitioner that it did not intend to appeal.[12] In this connection it must be borne in mind that the Court is not here dealing with parties and interventions in a common law suit. Rather it is dealing with the rights and duties of parties as to intervention in the field of federal

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[11] Cf: Sec. 402(b)(2) Communications Act of 1934; Sec. 1.102 Commission Rules, introduced in evidence in trial court (R. 97).

[12] See: *Churchill Tabernacle* v. *Federal Communications Commission*, 160 Fed. (2nd) 244 (C.A. D.C.), where an appeal was taken by an aggrieved person under Sec. 402(b)(2) of the Communications Act, although not an original party to the hearing before the Commission. Intervention came after the record was closed, but before the decision of the Commission became final.

administrative law, where review proceedings are provided.

It has been held that Congress, in enacting the Communications Act of 1934, clearly evidenced a legislative intent that interested persons should be alert to protect their interests. This precise question was settled in *Red River Broadcasting Co., Inc.* v. *Federal Communications Commission*, 98 Fed. (2nd) 282 (C.A. D.C.) (cert. denied 305 U. S. 625), in this pertinent language (page 286):

> "The burden, therefore, is, and properly should be, upon an interested person to act affirmatively to protect himself. It is more reasonable to assume in this case a legislative intent that an interested person should be alert to protect his own interests than to assume that Congress intended the Commission to consider on its own motion the possible effect of its action in each case, upon every person who might possibly be affected thereby. Such a person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated. To permit such a person to stand aside and speculate on the outcome; if adversely affected, come into this court for relief; and then permit the whole matter to be reopened in his behalf, would create an impossible situation."

It should be noted that in the *Red River* case the court observed that while the plaintiff was not a party to the proceedings before the Commission, it had *actual knowledge* of the proceedings while the right of intervention was open to it.

It is clear that the fact that the respondents were not parties to the proceedings before the Commission on the second application for license renewal cannot diminish the authority of the Commission to pass on the question of the public interest raised by the contract of April 1943. This very issue was decided by this Court in the case of *National*

Licorice Co. v. *National Labor Relations Board*, 309 U. S. 350, wherein the Court rejected the contention that a decision of the Labor Board relative to a contract embodying unfair labor practices was invalid because of the absence of individual employees (parties to the contract) as parties to the cause. The *National Licorice* case thus clearly establishes the proposition that the failure of the respondents to become parties to the proceedings before the Commission on the second application for license renewal does not in any way impair the validity of the Commission's decision that the contract adversely affected the ability of the radio station to properly function in the public interest. Nor does it give the respondents, or the state courts, authority to ignore the action of the Commission and treat the contract as though the Commission had not made its ruling in respect to it.[13] The Commission's decision is now final and binding upon petitioner and respondents alike.[14]

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[13] See also: *Harris* v. *Central Nebraska Public Power and Irrigation District*, 29 Fed. Supp. 425; *Union Dry Goods Co.* v. *Georgia Public Service Commission*, 145 Ga. 658, 89 S.E. 779, affirmed 248 U.S. 372, in which the Supreme Court of Georgia held:

> "An order of the railroad commission, fixing a schedule of rates to be charged by public service companies in a given municipality, is not invalid solely because a contract-holder of one of the public service companies was not made a party and notified of the proceedings before the Commission."

[14] See: *Atchison, Topeka & Sante Fe Ry.* v. *Scarlett*, 300 U.S. 471; *Red River Broadcasting Co., Inc.* v. *Federal Communications Commission*, 98 Fed. (2nd) 282, (cert. denied 305 U.S. 625); *Black River Valley Broadcasts* v. *McNinch, et al.*, 101 Fed. (2nd) 235.

III

The decision below, in giving effect to private contractual rights superior to and in conflict with the power of federal regulation under the Communications Act of 1934, was contrary to the prior decisions of this Court.

It is apparent from the foregoing that the Georgia State courts are not free to disregard the decision of the Commission as to the effect of the contract upon the ability of the radio station to function in the public interest. It is equally apparent that aside from the regulatory power of the Commission over radio broadcasting, including contracts affecting the ability of a station to operate in the public interest, the contract would be enforceable under Georgia law. Here then is a serious conflict, but not an insoluble one. It has long been the law that where the public interest is involved there may well arise a limitation upon the rights and duties created by an otherwise enforceable contract. Examples are numerous. In the absence of the Anti-Trust laws there is nothing to prevent a contract or combination in restraint of trade in interstate commerce. In the absence of a statute against usury there is nothing violative of the law of contracts in a note calling for ten per cent interest. Except for the act establishing the Interstate Commerce Commission, and the regulations of that body, there is nothing unlawful in an agreement to settle a personal injury claim in exchange for an annual pass on the railroad. In our highly integrated society it has become necessary to provide by law that in certain fields the public welfare—the public interest—demands that certain restraints be placed upon the absolute freedom of contract.[15] To the extent that a contract conflicts with the declared public interest the courts will decline to enforce

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[15] *American Brake Shoe & Foundry Co.* v. *Pittsburgh Ry. Co.*, 270 Fed. 812.

it.[16] This is no new departure. It is a thoroughly established concept of our law.

(a) *Those who contract with regard to radio broadcasting necessarily do so subject to the paramount right of federal regulation.* Were this not so, then the integrity of the congressional scheme for the effective regulation of the business of radio in the public interest would be a hollow myth. We do not contend that those who engage in the radio business are wholly deprived of freedom of contract; nor do we contend that their every act is subject to regulation and control by the Commission. But we do contend that insofar as their acts or their agreements affect the public interest in connection with the broadcasts from their stations, they are subject to and subordinate to federal regulation and control under the Communications Act. This principle has been most forcefully stated by this Court in *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 282, in the following language:

> "Those who operated broadcasting stations had no rights superior to the exercise of this power of regulation. They necessarily made their investment and their contracts in the light of, and subject to, this paramount authority. This Court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their enterprises."

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[16] *Central of Georgia Railway* v. *Blount*, 238 Fed. 292 (CCA 5); *Seaboard Air Line Ry. Co.* v. *Atlanta, B & C RR Co.*, 35 Fed. (2nd) 609 (CCA 5) (cert. denied 281 U. S. 737) where it was held:

> ". . . a court of equity may refuse specific performance of a valid contract where, by granting that relief, a paramount public interest will or may be interfered with."

(b) *Private contractual rights in the field of radio must yield to the exigencies of the public welfare when determined in an appropriate manner by the proper administrative agency.* It is well established by the decisions of this Court that contracts made in relation to matters involving the public interest, and within the federal regulatory power, must necessarily be regarded as having been made subject to the possibility that the exercise of the regulatory power might render such agreements unenforceable or impair their value. *L & N R. R. Co.* v. *Mottley*, 219 U. S. 467, 482. To follow any other course would be to render sterile and impotent all federal regulatory power. In a variety of situations this Court has consistently upheld the supremacy of the power of regulation in the public interest and has declined to recognize contractual rights in conflict therewith. As to a contract procured through violation of the National Labor Relations Act, this Court ruled that "it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it." *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 365. As to a contract of a railroad to furnish annual passes in exchange for settlement of a tort claim it was held that "after the commerce act came into effect no contract that was inconsistent with the regulations established by the Act of Congress could be enforced in any court" and that it was not determinative of the question that the construction of the Act by the Court would "render the contract of no value for the purposes for which it was made." *L & N. R. R. Co.* v. *Mottley*, 219 U. S. 467, 483. As to the contention that a public utility, having contracted to deliver electricity at a certain rate, could not charge a higher rate when authorized to do so by the public service commission, but was bound by its contract to charge the lower rate, this Court replied

that "the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the State. . . ." *Union Dry Goods Co.* v. *Georgia Public Service Commission*, 248 U. S. 372.

(c) *The determination of the rights of the parties must be made in the light of and with reference to the decision of the Commission.* Applying the foregoing legal principles to the case at bar, this situation appears. The Commission obviously had jurisdiction to make its finding that the burdens of the contract were contrary to the public interest involved. The decision of the Commission was binding upon both petitioner and the respondents. No appeal having been taken the Commission's decision was final and not subject to collateral attack. Nor can the Commission's decision be set at naught by a decree of the state court which in effect directs petitioner to do the very thing which the Commission has expressly forbidden it to do. The contract, being inconsistent with the decision of the Commission, cannot be enforced in any court. It has become legally impossible of performance.[17] The contract is valueless unless the radio station operates. Yet the station cannot legally operate so long as the contract is in effect. While there is much respectable authority for the proposition that impossibility excuses further performance and all contractual duties are thereby discharged,[18] it is not the contention of the petitioner that the respondents in these circumstances should be remediless. It has never been the position of the petitioner that it could keep what it has received from the re-

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[17] See: *Central of Georgia Ry.* v. *Blount*, 238 Fed. 292 (CCA 5).

[18] See: *The Macon & Birmingham Railroad Co.* v. *Gibson*, 85 Ga. 1, 17, 11 S. E. 442; *Cowley* v. *Northern Pacific Ry. Co.* (Wash.) 123 Pac. 998; *Operator's Oil Co.* v. *Barbre*, 65 Fed. (2nd) 857, 862; *Malcomson* v. *Wappoo Mills*, 88 Fed. 680; *McElheney* v. *Jasper Trading Co.*, 12 Ga. App. 790, 78 S.E. 727; *National Pavements Corp. of California* v.

spondents and give nothing in return. It does contend that under the circumstances it is not obligated to perform the contract in the sense that it is now required to pay for what it has received the strict measure of consideration called for by the contract itself. To do so would conflict with the decision of the Commission and be contrary to the public interest. The solution must be found in the equities of the situation. In other words, the respondents should receive fair and reasonable compensation for what they have given, even though they cannot enforce the contract itself. This is entirely consistent with the holding of this Court in *L. & N. R. R. Co.* v. *Mottley*, 219 U. S. 467, 486.[19]

The record in this case indicates that the property received by petitioner from respondents under the contract of April 1943 had a value between $40,000.00 and $70,000.00 (R. 95). The record also discloses that prior to the decision of the Commission condemning the contract, petitioner had already paid to respondents under the contract the sum of $149,408.38 (R. 89). Petitioner has at all times been willing to have a determination made as to the fair value of what it received from respondents under the contract, and if it should be determined in a proper proceeding that the value exceeds what petitioner has already paid, then petitioner stands ready to pay the balance. But this is an entirely different thing from paying 15% of the gross income from the operation of the radio station, as called for by the condemned contract, without reference to the fair value of what petitioner received.

Hutchinson Co., 22 Pac. (2nd) 534; *Peckham* v. *Industrial Securities Co.* (Del.) 113 Atl. 799; *Pabst Brewing Co.* v. *Howard* (Mo.) 211 S.W. 720; Restatement of Contracts, Par. 458.

[19] Accord, *Ryan* v. *KVL, Inc.*, 198 Wash. 459, 88 Pac. (2nd) 836, where it was held that failure to obtain Commission approval of a contract for sale of a radio station excused performance under the contract, but under the doctrine of equitable rescission the promisee was awarded the fair value of his full performance, less what he had already received in return.

In their brief in opposition to petition for certiorari (pages 8, 9), respondents argue that even if it became improper or illegal for a percentage of the funds derived from the operation of the station to be paid to respondents under the contract this would not relieve petitioner from its obligation to pay for the property which it has received and converted to its own use. They contend further that the state court has power to enforce this obligation, citing *N. Y. Central & H. R. RR. Co.* v. *Gray*, 239 U. S. 583. The *Gray* case is, however, certainly no authority for the proposition that where the Commission has found performance of the contract in accordance with its terms to be contrary to the public interest, a state court may nevertheless, without regard to the findings and conclusions of the Commission, render a judgment which in effect requires performance of the contract in accordance with its terms. What the *Gray* case does hold is that where performance of the promise in accordance with its terms becomes impossible as a matter of law, the promissor is not relieved of the equitable duty of paying the *reasonable value* for what he has received. Petitioner has consistently taken the position that the findings and conclusions of the Commission do not relieve it of the equitable duty of paying the reasonable value for what it has received from the respondents. But the measure of the respondents' rights under this principle would not be the provisions of the contract found contrary to the public interest, but rather the *reasonable value*, the fair value of the property petitioner has received, determined under applicable principles of quasi-contract. This, then, is clearly a case for the application of the principle of equitable rescission.[20] The *Gray* case states no more than this principle.

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[20] Cf: *Ryan* v. *KVL, Inc.*, 198 Wash. 459, 88 Pac. (2nd) 836; Note, 49 Columbia Law Review 855, 857 (June 1949).

Conclusion

We submit, therefore, that the judgment below should not be permitted to stand. It constitutes the clearest kind of collateral attack on the decision of the Commission in violation of Article VI of the Constitution. It invades the jurisdiction of the Commission as to matters exclusively vested in the Commission by Act of Congress, and substitutes the judgment of the state court for that of the expert body created by federal statute to determine such matters. The issues raised in this case go to the very foundation of the concept of administrative law. The decision below, unless set aside, will not only destroy the power of the Federal Communications Commission to effectively control the business of radio broadcasting in the public interest, as contemplated by the Congress, it will at the same time undermine the validity, dignity and effectiveness of all decisions and rulings of administrative agencies enforcing federal laws. It is submitted that such a thwarting of federal public policy should not be permitted, and that the judgment of the Court of Appeals of Georgia should be reversed.

Respectfully submitted,

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APPENDIX A

Applicable sections of the Communications Act of 1934 (Chap. 5, Title 47, USCA) not quoted in the petition or brief:

"Sec. 307 (a). The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act."

"Sec. 308 (b). All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation."

"Sec. 309 (a). If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event that Commission upon examination of any such application

does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

"Sec. 310 (b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

"Sec. 402 (b). An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of any existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

"(3) By any radio operator whose license has been suspended by the Commission."

"Sec. 402 (c) Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commission. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public

announcement of the decision is made at the office of the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application or order involved, and also a like copy of its decision thereon, and shall within thirty days thereafter file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise delivered a copy of said notice of appeal."

"Sec. 402 (d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party."

"Sec. 402 (e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court

shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 83

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,

Petitioner,

vs.

W. E. CARROLL, CLARENCE H. CALHOUN, MRS. HATTIE J. PICKARD, MRS. EMMA B. MOORE AND SAM PICKARD, TRUSTEE FOR SAM PICKARD, JR.,

Respondents

REPLY BRIEF FOR PETITIONER

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Respondents

REPLY BRIEF FOR PETITIONER

With the permission of the Court we desire to reply to certain contentions advanced by the respondents in their brief on the merits. Apparently respondents rely primarily for an affirmance of the judgment below upon the following propositions:

1. Decision of the Federal question raised by petitioner was not necessary to the decision of the State court because (a) the contract called for the payment of a sum *equal* to 15 per cent of the net billings of the station rather than for the payment of 15 per cent of

the net billings themselves, and (b) since petitioner concedes that respondents are not altogether remediless and the Supreme Court of Georgia has ruled that petitioner did not in its answer make out a case for any affirmative equitable relief, the Court of Appeals of Georgia was authorized to award damages as for breach of contract in the sum of $144,968.63.

2. Respondents have not collaterally attacked the rulings of the Commission and no ruling was sought or had from the State court regarding any question over which the Commission had jurisdiction.

3. There was no duty or obligation upon respondents to intervene before the Commission as the private rights of the respondents under the contract could not be adjudicated by the Commission, and it would be a denial of due process to hold that the Commission's rulings relative to the contract are binding upon respondents.

We believe that we can demonstrate the basic unsoundness of all these contentions.

1

A decision upon the Federal questions in this case, as to the binding effect of a ruling of the Commission, the effect of this ruling on any action to enforce the contract, and the respect to which the Commission's ruling is entitled under Article VI, when that ruling is pleaded in a subsequent proceeding in a State court, was an indispensable preliminary to a final decision upon the contract itself. And these that Federal questions were squarely raised by petitioner in its original answer. In its answer petitioner pleaded as a defense the various proceedings before the Commission and the decisions of the Commission with respect thereto (R. 18-84). At the trial evidence was introduced, without objection, to support this defense (R. 89-96). The trial court ruled adversely to that defense (R. 108-112). Petitioner ex-

cepted and assigned error upon this ruling in its appeal (R. 112-122). We submit that before the court below could properly make final disposition of the question of whether there was an unexcused breach of contract it had to pass upon the Federal questions necessarily presented by petitioner's defense.

(a) It is inconceivable to us that the decision in this case should be controlled by the words "a sum *equal* to 15 per cent of the net billings". It is true that this language appears in Paragraph 4 of the contract (R. 12). However, in the same paragraph of the contract there also appears this language (R. 13):

> "Within ten (10) days after the expiration of each month from and after the aforesaid effective date of this contract, the party of the first part shall determine the net billings for said month and *shall pay fifteen (15%) per cent thereof* to the hereinafter named agent of the second parties and *said monthly payments of fifteen (15%) per cent of the net billings of said Station* shall exist and continue for a full period of eighty and three-fourths (80¾) months and until January 6th, 1950." (Emphasis added)

Counsel for respondents apparently considered the above language to be controlling as to the source of the payments under the contract at the time they filed the original petition, as they said in their suit (R. 10):

> "The contract further provides that within ten days after the expiration of each month from and after the aforesaid effective date, said defendant, the Regents of the University System of Georgia, shall determine the net billings for said month *and shall pay 15 per cent thereof* to the hereinafter named agent of the second parties *and said monthly payments of 15 per cent of the net billings of said station* shall exist and continue for a full period of 80¾ months and until January 6, 1950'." (Emphasis added)

The trial court apparently considered that the payments under the contract were to come from the operation of the radio station itself, its judgment reciting (R. 110):

> "7. The plaintiffs are entitled to have the defendant Board of Regents account to them *for fifteen per cent of the net billings received by the defendant Board of Regents from the operation of Radio Station WGST* from August 1, 1945 to September 1, 1947." (Emphasis added)

The Court of Appeals of Georgia apparently considered that the source of the payments under the contract was to be the operation of the radio station itself, its judgment reciting (R. 138);

> "What we hold, and nothing more, is that . . . the regents were liable to the plaintiffs under said contract for such breach *for the 15 per cent of the net billings received from the operation of said radio station* from August 1, 1945, to the filing of this suit . . ." (Emphasis added)

The record just does not bear out the current contention of the respondents that the contract simply "established a basis for determining the amounts to be paid" and that the "funds for the payments did not have to come from the operation of the station." On the contrary, the record clearly establishes that the opposite is true. As shown by respondents' own brief (p. 2-3), petitioner is a public corporation of the State of Georgia, authorized to acquire and hold property in trust for the respective institutions in the University System of Georgia; that the Georgia School of Technology (referred to as applicant) is a state-supported institution of higher learning and a constituent part of the University System of Georgia; and that petitioner accepted the transfer of the assets of the corporation known as Southern Broadcasting Stations, Inc. in *trust* for the exclusive use and benefit of Georgia Tech.

It is a matter of public knowledge that the State of Georgia appropriates public funds to the Board of Regents for the support and maintenance of the various units of the University System. We doubt the power, and certainly the propriety, of the Regents to pay approximately $150,000.00 of public funds, or any other funds under its control, other than the funds of the radio station, for the benefit of this trust. It is folly to suppose that when this contract was made any such proposition entered the minds of the parties on either side. The contract itself provided that petitioner should pay 15 per cent of the net billings of the station and it is inescapable that the parties intended the funds to come from this source and only from this source.

(b) The second contention of respondents is likewise without substantial merit. It is true that the Supreme Court of Georgia, in transferring this case to the Court of Appeals of Georgia, observed that petitioner had not prayed for any "affirmative equitable relief", but the Court was careful to provide (R. 126) that it was not intimating thereby any opinion as to the rights of petitioner and that a court at law was the proper tribunal to determine what rights petitioner might have under its plea, even though this might call for the application of equitable principles. The matter of equitable rescission (really restitution) was raised by the original answer (R. 23), petitioner contending that it had already paid to respondents more than the fair value of the property it had received from them; therefore under the equities of the situation petitioner contended it was not further indebted to respondents. The trial court ruled that petitioner could not go into that issue (R. 110), and petitioner duly excepted from this ruling (R. 4 and 120). The contention of respondents (Respondents brief, p. 17), that proper pleadings were not filed under Georgia practice to raise this issue, is therefore without foundation.

Lastly, respondents contend that since petitioner ac-

knowledges that there may be a *quasi* contractual liability on its part, the Court of Appeals of Georgia was authorized to find a breach of contract and award damages for such. This is an obvious *non-sequitur*, for the *quasi* contractual liability springs from the fact that the contract itself has become excusably impossible of performance on the part of petitioner and there is no actionable breach, but the equities of the situation demand that respondents should receive the fair value of what they have rendered.[1] But this is an entirely different thing from a judgment for 15 per cent of the net billings from the operation of the radio station, as called for by the condemned contract, without reference to the fair value of what petitioner received, or what respondents have already received in return therefor. In this connection respondents assert that the measure of damages under Georgia law for breach of a contract to pay for property sold and delivered is the agreed contract price. This rule, however, is subject to the limitation under Georgia law that a party cannot receive more by way of damages for a breach of contract than he would have received had there been no breach.[2] And it is perfectly obvious here that had petitioner stood on the contract when it was condemned by the Commission as violative of the Communications Act, there would have been no breach, *and there would have been no further operation of the radio station, either;* hence the contract would have been valueless to respondents.

[1] See American Law Institute, *Restatement of Contracts*, Sec. 468(2): "Rights of Restitution

> (2) Except where a contract clearly provides otherwise, a party thereto who has rendered performance, for which the other party is excused by impossibility from rendering the agreed exchange, can get judgment for the value of what he has rendered, less the value of what he has received, unless what he has rendered can be and is returned to him in *specie* within a reasonable time."

See also: Williston on Contracts, Sections 1972 and 1974.

[2] *Lastinger* v. *City of Adel*, 69 Ga. App. 535, 536, 26 S. E. (2) 158; 25 C.J.S. 566, par. 74; 15 Am. Juris. 442, par. 43.

Respondents contend that they have not collaterally attacked the rulings of the Commission and that no ruling was sought or had from the State court regarding any question over which the Commission had jurisdiction. In support of this they quote from the decision of the State court (R. 137) that "The plaintiffs are not collaterally attacking the order and decision of the Federal Communications Commission by petition in Fulton Superior Court." But what a litigant or even the lower court calls an action is not determinative of its purpose or effect, for the reviewing court will look through form to substance and judge accordingly.[3]

Can the statements that "No ruling was sought or had from the State court regarding any question over which the Commission had jurisdiction" (Respondents' brief, P. 8) and "The decision of the State court does not purport to, and does not, decide any question over which the Commission has jurisdiction" (Respondents' brief, p. 9) stand the test of the record? We think not.

It was stipulated in the record what is clearly the law, that under the Communications Act of 1934 the Commission had (and respondents knew they had) jurisdiction over any contract or agreement affecting the operation of a radio station in the public interest or affecting the present or future financial ability of a radio station to function in the public interest (R. 95). We take this to mean what it says.

The Commission, after hearing, determined that "the

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[3] *Venner* v. *Michigan Central Railroad Co.*, 271 U. S. 127; *Southern Railway Company* v. *State of Georgia*, 188 Ga. 569, 576, 4 S. E. (2) 233, where the Supreme Court of Georgia said:

> "By its prayer the State has sought exactly the same result it would have sought had it in terms prayed that the Commission's order be enjoined. Therefore, to say that the State has not, in effect, prayed that the certificate be enjoined would be to emphasize form and ignore substance and reality."

arrangements under the contract of April 15, 1943, would jeopardize the licensee's financial ability to conduct the future operation of the station in the public interest and that, therefore, public interest, convenience or necessity would not be served by a grant of the instant application" (R. 70). We take this to mean what it says.

The Court of Appeals of Georgia in its decision said:

> "It cannot be anticipated that the contract sued on, insofar as it related to the payment of the agreed purchase-price of this stock and of the assets of the corporation, giving to the regents complete control of the radio station and its operation, would so far affect the financial ability of the radio station as to render the station unable to operate in the public interest. The evidence fails to show that the contract would affect the public interest in reference to the broadcasts of this station" (R. 137).

We take this to mean what it says. There are other equally obvious examples of the invasion of the jurisdiction of the Commission by the decision of the State court. They are treated in our main brief and will not be repeated here.

3

Respondents contend that there was no duty or obligation upon them to intervene before the Commission upon the hearing on the second application for license renewal and the rhetorical question is asked as to what relief they could have sought had they intervened. No one has ever suggested that the hearing before the Commission was the proper forum in which the respondents should have sought a judgment for 15 per cent of the net billings from the operation of the radio station. But it *was* the proper forum in which to test the question as to the effect of the contract upon the public interest involved in the operation of the station. Respondents were vitally interested in the determination of that question and under the law and the rules

of the Commission, and in the light of the circumstances under which the issue arose, they not only had the clear right to intervene,[4] it was their duty to do so.[5] Failing to do so they are bound by the determination of the Commission, the same as petitioner, that the contract adversely affects the public interest in the operation of the station and is violative of the Communications Act. Their rights under the contract must thereafter be considered in the light of the Commission's decision. The present decision of the Court of Appeals of Georgia has determined those rights without regard to the Commission's decision. Therein lies the Court's error.

There is no merit in the suggestion that the respondents would be denied due process by being bound by the Commission's ruling. Respondents contend (Respondents' brief, p. 24) that they were not parties to any of the proceedings in which the rulings now relied upon were made. In making this assertion they ignore the fact that their corporation, Southern Broadcasting Stations, Inc., was a party by intervention to the proceedings on the first application for license renewal. Apparently their corporation, and its president (one of the present respondents), recognized the propriety and necessity of appearing in the earlier proceedings. It is obvious as a practical matter that the conditional denial of the first application was what made the contract of April 15, 1943 possible, and the decision of the Commission that petitioner could continue to operate the station if it assumed proper control, was the factor that enabled the parties thereto to think in terms of 15 per cent of the gross income from the further operation of the station. With complete knowledge of the factors which produced the contract; and

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[4] *Churchill Tabernacle* v. *Federal Communications Commission*, 160 F. 2d 244.

[5] *Red River Broadcasting Co., Inc.*, v. *Federal Communications Commission*, 98 F. 2d 282 (certiorari denied 305 U. S. 625).

with full knowledge of the result the parties sought to achieve by means of the contract; and with full knowledge that the hearing before the Commission was the forum in which it would be decided whether or not the desired result had been achieved; and with notice and knowledge of the hearing, the proposed decision and the final decision; and with the right to intervene as an interested party and the right to appeal as an aggrieved party guaranteed to them by law and the rules of the Commission, the respondents are hardly in a position to seriously contend that they have been denied due process.

Conclusion

We submit that the basic fallacy in the position of the respondents stems from a stubborn refusal to recognize the principle so often repeated by this Court that the rights of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the proper governmental authority, and that the rights of the parties to this litigation must be determined in the light of, and consistent with the decision of the Commission, and not by ignoring that decision.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM [redacted] 1949

No. [redacted] 83

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,

Petitioner,

vs.

W. E. CARROLL, CLARENCE H. CALHOUN, MRS. HATTIE J. PICKARD, MRS. EMMA B. MOORE, SAM PICKARD, JR.

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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INDEX

SUBJECT INDEX

Pages

Summary of Argument 1

Argument 2

A. No substantial federal question is involved 4

B. Decision of the federal question was not necessary to the judgment of the State Court 7

The petitioner concedes that respondents are entitled to relief. The relief granted was within the competence of the State Court 11

C. Writ of Certiorari should not be granted because the decision of the State Court rests on adequate non-federal grounds 13

APPENDIX A

Section III of brief of FCC in Churchill Tabernacle v FCC reported in 160 F. 2d, 244 14

TABLE OF CASES CITED

Churchill Tabernacle v FCC, 160 F. (2d) 244 6

FCC v. Pottsville Broadcasting Co., 309 U.S. 134 ..... 2, 5

FCC v. Sanders Bros., 309 U.S. 470 ..... 2, 5

Lynch v. New York Ex Rel Pierson, 293 U.S. 52 13

National Licorice Co. v. Natl. Labor Relations Board, 309 U.S. 350 ..... 2, 6

New York Central & H.R.RR Co. v. Gray, 239 U.S. 583 9

Nutt v. Knut, 200 U.S. 12 7

Radio Station WOW v. Johnson, 326 U.S. 120 ..... 1, 2, 4, 13

State of Ga. v. Regents of University System of Georgia, 179 Ga. 210 12

Williams v. Kaiser, 323 U.S. 471 13

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1948

No. 820

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,

Petitioner,

vs.

W. E. CARROLL, CLARENCE H. CALHOUN, MRS. HATTIE J. PICKARD, MRS. EMMA B. MOORE, SAM PICKARD, JR.

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

SUMMARY OF ARGUMENT.

The petition should be denied for the following reasons:

(A) There is no substantial federal question involved. The federal question sought to be raised by petitioner has been adjudicated, adversely to petitioner's contention, by this Court.

Radio Station WOW v. Johnson, 326 U. S. 120, 131;

Federal Communications Commission v. Sanders Bros., 309 U. S. 470, 475;
Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 138;
National Licorice Co. v. National Labor Relations Board, 309 U. S. 350, 362.

(B) Decision of the federal question sought to be raised in the State court was not necessary to the determination of the case by that court.

The suit was for damages for breach of contract to pay the agreed purchase price for property sold and delivered; the purchase price fixed by the contract being "a sum *equal to* 15 per cent of the net billings" of the radio station. The contract was not for the sale of any interest in a license to operate a radio station.

The petitioner (defendant in the State court) conceded, and now concedes, that the respondents were entitled to some recovery (petitioner's brief, page 40). The State court decided that under Georgia law respondents were entitled to recover damages in the amount fixed by the judgment (R. 138).

(C) This Court will not review a State court decision resting on an adequate and independent non-federal ground even though the State court may have also summoned to its support an erroneous view of federal law.

Radio Station WOW v. Johnson, 326 U. S. 120, 129.

ARGUMENT.

The contract, for the breach of which the respondents sued for damages, was for the sale, by respond-

ents to the petitioner, of all of the capital stock of a Georgia corporation which owned assets consisting of radio broadcasting facilities, appliances and equipment and various other property, tangible and intangible. It did not include, or attempt to include, any license to operate a radio broadcasting station or any interest in such license. The contract was fully performed by the respondents; the assets belonging to the corporation were turned over to petitioner; the charter of the corporation was surrendered, and the corporation was dissolved. (R. 91). The contract (R. 12-16) obligated the petitioner to pay respondents "as the full purchase price of said shares of stock, *a sum equal to 15 per cent* of the net billings of Radio Station WGST located in Fulton County, Georgia, from sale of time on the air for any and all types of broadcasting . . ." (R. 12). The petitioner did not contest the fairness of the contract or its validity. The only defense sought to be made was, as stated by the Court of Appeals of Georgia, that under the rulings of the Federal Communications Commission, "it had become impossible to carry out the contract sued on, and therefore the Regents are excused from a performance thereof" (R. 129). The Court of Appeals of Georgia, after discussing the contentions of the petitioner, held that there had been an unexcused breach of contract by the petitioner and that it was liable for damages for such breach. The court said (R. 138):

> ". . . What we hold, and nothing more, is that, under the pleadings and agreed facts, the trial judge correctly found that there had been an unexcused breach by the regents of the contract of April 15, 1943, and that the regents were liable to the plaintiffs under said

contract for such breach for the 15 per cent of the net billings received from the operation of said radio station from August 1, 1945, to the filing of this suit, or as found by the trial court, for damages of $144,968.63 principal, and $10,991.31 accrued interest, being 15 per cent of the net billing during such time."

A.

No substantial federal question is involved.

This Court, in *Radio Station WOW, Inc. v. Johnson, 326 U. S. 120*, has settled the principle that state courts have the undoubted power and jurisdiction to adjudicate claims growing out of the transfer of radio stations and facilities and that nothing in the Communications Act dislodges this power. The following language is quoted from the opinion in that case (pp. 131-2):

> "We have no doubt of the power of the Nebraska court to adjudicate, and conclusively, the claim of fraud in the transfer of the station by the Society to WOW and upon finding fraud to direct a reconveyance of the lease to the Society. And this, even though the property consists of licensed facilities and the Society chooses not to apply for retransfer of the radio license to it, or the Commission, upon such application, refuses the retransfer. The result may well be the termination of a broadcasting station. The Communications Act does not explicitly deal with this problem, and we find nothing in its interstices that

> dislodges the power of the States to deal with fraud merely because licensed facilities are involved. *The 'public interest' with which the Commission is charged is that involved in granting licenses. Safeguarding of that interest can hardly imply that the interest of States in enforcing their laws against fraud have been nullified insofar as licensed facilities may be the instruments of fraud.*" (Emphasis added.)

"In *Federal Communications Commission v. Sanders Bros. 309 U. S. 470, 475*, this Court said:

> "But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy."

In *Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 138*, the Court said:

> "The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication."

We respectfully submit that the decisions of this Court above cited conclusively settle the principle that the Communications Act does not take away the power and jurisdiction of the state courts to adjudicate the private rights of parties growing out of contracts, so long as such contracts do not deal with licenses for the operation of radio broadcasting stations, and that the Federal Communications Commission has no power or jurisdiction to hear, try or determine the rights and obligations of the parties growing out of such con-

tracts, even though radio broadcasting facilities are in olved.

This Court has also conclusively settled the principle that it is not within the power of any tribunal to make a binding adjudication of the rights in personam of parties not brought before it by due process of law. *National Licorice Co. v. NLRB, 309 U. S. 350, 362.*

The Commission itself has repeatedly said "that so far as contracts between licensees and others do not have as their subject matter the rights conferred by a license or do not substantialy affect such rights, it is not within the scope of the Commission's functions to pass upon them" and that "contracts for the sale of broadcasting facilities which do not involve transfer of the license itself or rights conferred by it, are matters of private concern and do not require Commission consent or approval". (Footnote 1).

Footnote 1:

Thus in *Churchill Tabernacle v. FFC*, 160 *F.* (2*d*) 244, the Commission had passed an order which by its terms would seem to have the effect of requiring the applicant for the license in that case to repudiate its obligations under the contract for the purchase of the station and its facilities. The order in that case denied the license "but without prejudice to the licensee corporation to file a new application when it should be able to show that it thereafter had the exclusive use and control of the station, and that no further effect would be given to the agreement with the church." (160 F. (2d) at page 246.)

When the case was under review by the United States Court of Appeals for the District of Columbia the Commission took the position that its order left the seller of the property free to assert its right of action "in another tribunal" for the recovery of the agreed purchase money or for the reverter of the property sold. (160 F. (2d) at page 247). An exact copy

B.

Decision of the Federal Question was not necessary to the judgment of the State Court.

The only defense which the petitioner sought to make in the State court was, as stated by the Georgia Court of Appeals, "to the effect that they are excused as a matter of fact and of law from further performance of this contract by reason of the impossibility of their performing the same because of an act of law". (R. 129). As we have pointed out, the contract was to pay "a sum equal to 15 per cent of the net billings" of the station for a certain period.

The contract to pay a "sum equal to 15 per cent of the net billings" of the station did not give the respondents any interest or share in the receipts from the operation of the station. It simply created a legal obligation upon the part of the petitioner and established a basis for determining the amounts to be paid. The funds for the payments did not have to come from the operation of the station. In *Nutt v. Knut, 200 U. S. 12, 21*, this Court, dealing with a State court judgment awarding damages for the breach of a contract of employment of an attorney on a contingent fee basis to prosecute a claim against the government, held:

> "It does not follow, however, that for this error, the judgment must be reversed. There is a provision in the contract of 1882 which

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of the portion of the brief filed on behalf of the Commission in that case dealing with the question under discussion is attached as Appendix A to this brief. It is squarely in line with our position in this case.

> can stand alone, and which was not in violation of the statute; namely, the one evidencing an agreement on the part of Nutt's executrix to pay to the attorney for his services a sum equal to 33-1/3 per cent of the amount allowed on the claim. Wylie v. Coxe, 15 How. 415, 14 L. ed. 753; Wright v. Tebbitts, 91 U. S. 252, 23 L. ed. 320; Taylor v. Bemiss, 110 U. S. 43, 28 L. ed. 64, 3 Sup. Ct. Rep. 441. Such an agreement did not give the attorney any interest or share in the claim itself, nor any interest in the particular money paid over to the claimant by the government. It only established an agreed basis for any settlement that might be made, after the allowance and payment of the claim, as to the attorney's compensation. It simply created a legal obligation upon the part of the estate, which, if not recognized after the collection of the money, could have been enforced by suit for the benefit of the attorney, without doing violence to the statute or to the public policy established by its provisions. The decree below may then be regarded as only giving effect to the agreement as to the basis upon which the attorney's compensation was to be calculated . . ."

Even if, for any reason, it became improper or illegal for a percentage of the funds derived from the operation of the station to be paid to respondents under the contract this would not have relieved the petitioner from its duty and obligation to pay for the property which it had received and converted to its own use. And the State court had the power to enforce this

obligation. *N. Y. Central & H. R. RR Co. v. Gray, 239 U. S. 583.* In that case it was held that, although the passage of the Hepburn Act of June 29, 1906, rendered it illegal for a carrier to comply with a contract previously made to furnish transportation in payment of the purchase price of property which it had received, it was within the jurisdiction of the State court to give judgment for the money value of the unpaid purchase price. The Court said (pp. 586-7):

> "In Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 476, et seq., 55 L. ed. 297, 301, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265, it was held that the prohibition we have quoted prevented the exchange of transportation for services, advertising, releases, property, or anything else than money, and that this operated upon an agreement made long before the passage of the act, whereby the carrier, in considration of a release of damages for injuries sustained by Mottley and his wife in consequence of a collision of trains upon the railroad, agreed to issue free passes to them, renewable annually during their several lives, the result being that after the taking effect of the Hepburn Act specific performance of this agreement could no longer be required.
>
> . . .
>
> "In the present case, therefore, the railroad company acted strictly in accordance with the law when it refused any longer to furnish transportation to defendant in error in performance of the contract of November, 1900.

But from this it by no means follows that it could refuse to make just compensation in money for the unpaid balance of the purchase price of the map. The judgment of the state court proceeded upon the ground that since the contract had been fully performed by Gray, so that the railroad company had received the entire benefit of it, and since the delivery of the particular consideration stipulated for had been prohibited by the act of Congress, the company thereupon became bound upon general principles of justice to pay him an equivalent in money for the balance of the consideration. In so holding the court was simply administering the applicable principles of state law, and did not run counter to the act of Congress. If the court had accorded legal efficacy to an executory contract made after the taking effect of the Hepburn Act, and contrary to its provisions, a different question would be presented. But there is nothing in the act to prevent or relieve a carrier from paying in money for something of value which it had long before received under a contract valid when made, even though the contract provided for payment in transportation, which the passage of the act rendered thereafter illegal. In the Mottley Case, while the right to further specific performance of the contract for free passage was denied, the court said (219 U. S. 486): 'Whether, without enforcing the contract in suit, the defendants in error may, by some form of proceeding against the rail-

road company, recover or restore the rights they had when the railroad collision occurred, is a question not before us, and we express no opinion on it.'".

The petitioner concedes that respondents are entitled to relief. The relief granted was within the competence of the State Court.

In their brief in support of the petition for certiorari counsel say (p. 40):

"It is not the contention of the petitioner that the respondents in these circumstances should be remediless. It has never been the position of petitioner that it could keep what it has received from the respondents and give nothing in return. It does contend that under the circumstances it is not obligated to perform the contract in the sense that it is now required to pay for what it has received the strict measure of consideration called for by the terms of the contract itself. To do so would conflict with the decision of the Commission and be contrary to the public interest. (L & N R.R. Co. v. Mottley, 219 U. S. 467). The solution must be found in the equities of the situation. In other words, respondents should receive fair and reasonable compensation for what they have given, even though they cannot enforce the contract itself. This is clearly a case for the application of the doctrine of equitable rescission."

The Supreme Court of Georgia, in the decision transferring the case to the Court of Appeals, held that petitioner (plaintiff in error in that court) did

"not ask for rescission or pray for any *affirmative* equitable or legal relief." (R. 125). The Supreme Court and the Court of Appeals held that the action was for the recovery of damages for breach of contract and that the only defense set up by petitioner was that performance of its obligation to pay the amounts called for by the contract had been rendered impossible, and that the breach was therefore excused. The State courts held that this defense was not made good by petitioner which admitted a prima facie case and assumed the burden.

We respectfully urge that the decision was correct. It is not disputed, it is conceded, that the Commission, in the exercise of its powers under the Act, may refuse a license to an applicant who is unfit, financially or otherwise. But surely the Commission does not have the power, where it finds that an applicant lacks the financial qualification, to relieve it of its solemn obligations to pay for property which it has received and used. If the Commission had the power to authorize petitioner to repudiate its obligations to respondents in order to become financially qualified as a licensee, then there would seem to be no reason why the Commission could not also authorize petitioner to repudiate any of its other financial obligations. The Regents, an agency of the State of Georgia, has many financial obligations which it has, from time to time, incurred legaly. See *State of Georgia v. Regents of the University System of Georgia, 179 Georgia, 210, 218.*

C.

Writ of Certiorari should not be granted because the decision of the State Court rests on adequate non-federal grounds.

Radio Station WOW v. Johnson, 326 U. S. 120, 129;

Williams v. Kaiser, 323 U. S. 471, 477;
Lynch v. New York Ex Rel Pierson, 293 U. S. 52.

Respectfully submitted,
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APPENDIX A.

(Section III of Brief for Federal Communications Commission, in the case of *Churchill Tabernacle vs. Federal Communications Commission, Case No. 9249 in the U. S. Court of Appeals, District of Columbia.* The decision in the case is reported in 160 F (2d) 244.)

"III

"The Commission in its decision has only passed upon issues relating to the public interest in the exercise of its licensing powers and has not adjudicated the private rights of the parties under their contract.

"In holding that an improper surrender of the statutory responsibility of a licensee is imposed by those provisions of the contract which reserve time for appellant's sole and absolute use and disposition, the Commission has determined that it is not in the public interest to make a grant to a licensee whose exercise of discretion in the operation of the station would be curtailed by the obligations to make specific performance of these provisions in the manner contemplated by the contract. The Commission has not, however, undertaken to pass upon the private rights of the parties under the contract. Proceedings undertaken by the Commission in the exercise of its licensing functions are not for the adjudication of private rights. "The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication." *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138. A determination of the Commission that a contract entered into

by a licensee contains features which involve an improper surrender of his statutory responsibility may preclude the grant of a license subject to specific performance of those features which are inconsistent with the principles of licensee responsibility established by the Communications Act. It would not, however, foreclose the parties from taking any other action to secure an adjudication on their contracts, nor prejudice their rights in the event of such adjudication. See *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350, 365.

"The Commission has consistently held that so far as contracts between licensees and others do not have as their subject matter the rights conferred by a license or do not substantially affect such rights, it is not within the scope of the Commission's functions to pass upon them. Thus, it has held that contracts for the sale of broadcasting facilities which do not involve transfer of the license itself or rights conferred by it, are matters of private concern and do not require Commission consent or approval. *M. A. Leese*, 5 F.C.C. 364 (1938); *Hearst Radio, Inc.*, 7 F.C.C. 292 (1939); *City of Atlantic City*, 7 F.C.C. 485 (1939). Similarly, the Commission has declined to pass on controversies between the parties arising out of agreements relating to the physical properties of a broadcasting station. Thus, with respect to the very contract of 1931 here involved, the Commission has declined to determine whether a new transmitter and site purchased by the licensee are subject to the appellant's lien and right of reverter of physical properties created by the contract. *Buffalo Broadcasting Corporation*, 9 F.C.C. 31, (1941). Similarly, the Commission has taken the view that it has no concern with action between the parties based upon alledged inadequacy of the consideration for transfer of physical

facilities for broadcasting. See *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, and the brief of the Commission in that case (App. Br. Appendix D, p. 15). See also *Station WMCA*, File No. B1-AL-390 (decided November 16, 1943).

"It is thus clear that in determining that a contractual arrangement affects the responsibilities of a licensee in a manner which is inconsistent with the proper exercise of a licensee's responsibility under the Communications Act, the Commission is not adjudicating the private rights of the parties properly cognizable in another forum. Nor has the Commission attempted to do so in this case. Although appellant appears to argue that the Commission's decision requires abrogation of the arrangements for reverter of the physical property in the event of default and for weekly payment to appellant of $150 for the term of the contract, it nevertheless recognizes (Br. 48) that the Commission's conclusions of law do not single out these provisions as inconsistent with the Act and that "the decision may, therefore, properly be held as not intending to rest the denial of licenses upon these provisions or to require their abrogation." For the Commission did not purport to hold those provisions which it found to curtail unduly the licensee's responsibility were illegal and void for the purposes of adjusting the private rights of the parties. Thus, although the Commission in its proposed findings, referred to these provisions as "illegal" (R. 2559) after counsel for appellant on oral argument called the Commission's attention to the significance of such a characterization (R. 2600), the Commission eliminated those references in the final decision (J. A. 155). Therefore, such questions relating to the private rights of the parties as to whether the licensee's inability to perform the provisions for reservation of

the time entitle appellant to damages at law, or constitutes a failure of consideration entitling appellant to restitution or reformation of the contract in equity are questions which the Commission did not attempt to pass on and which are not prejudged or foreclosed by its decision.

CONCLUSION

"For the foregoing reasons, it is respectfully submitted that the appeal should be dismissed.

FEDERAL COMMUNICATIONS COMMISSION,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 83

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
Petitioner,

vs.

W. E. CARROLL, CLARENCE H. CALHOUN, MRS. HATTIE PICKARD, MRS. EMMA B. MOORE, and SAM PICKARD, Trustee for Sam Pickard, Jr.,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR RESPONDENTS

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INDEX

SUBJECT INDEX

	Page
Brief for respondents	1
Preliminary Statement	1
Summary of the Argument	6
Argument	10
Decision of the Federal question was not necessary to the judgment of the State Court	10
The petitioner conceded that respondents are entitled to relief. The relief granted was within the competence of the State court	14
The rulings of the Federal Communications Commission did not purport to relieve the Regents of their legal obligation to pay for the property which they had bought from respondent	19
The respondents did not collaterally attack the rulings of the Commission	23
To give to the rulings of the Commission the effect which the Regents contend should be given thereto would amount to a denial of due process as to respondents	24
As to the right, or duty, of Respondents to have Intervened in the Proceeding before the Commission	26
The decision of the Georgia court does not purport to and does not decide any question over which the Commission had jurisdiction	31
Conclusion	37
Appendix A	39
Appendix B	43

TABLE OF CASES CITED

Allen v. *Alleghany Co.*, 196 U. S. 458	18

Page

Application of Station WMCA, In re, 10 FCC 241 26
Assignment of License of Station WMCA, In re, 10 FCC 241 19
Buffalo Broadcasting Corp., In re, 9 FCC 31 19, 29
Central New England R. Co. v. Boston A. R. Co., 279 U. S. 415 18
Churchill Tabernacle v. *Federal Communications Commission*, 160 F. 2d 244 21, 30
City of Atlantic City, In re, 7 FCC 485 19, 28
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134 8, 20, 34, 37
Federal Communications Commission v. Sanders Bros. Radio Station, 309 U. S. 470 8, 20, 34
Galpin v. Page, 18 Wall. 350 26
Grand Rapids & I. R. Co. v. *Butler*, 159 U. S. 87 17
Hearst Radio, Inc., In re, 7 FCC 292 19, 28
Klinger v. Missouri, 13 Wall. 257 15
Leathe v. *Thomas*, 207 U. S. 93 15
Leese, et al., In re, 5 FCC 364 19, 29
Lynch v. New York, ex rel., 293 U. S. 52 15, 16
McGowan v. Parish, 237 U. S. 285 10, 18
National Foundry & Pipe Works v. *Oconto City Water Supply Co.*, 183 U. S. 216 17
National Licorice Co. v. *National Labor Relations Board*, 309 U. S. 350 24
N. Y. Central & H. R. RR Co. v. Gray, 239 U. S. 583 12
Nutt v. *Knut*, 200 U. S. 12 10, 18
Radio Station WOW, Inc. v. *Johnson*, 326 U. S. 120 7, 9, 15, 16, 31, 34, 36, 37
Regents of the University System of Ga. v. *Carroll, et l.*, 203 Ga. 292 7, 14, 17, 25

Regents of the University System of Ga. et al. v. Carroll, et al., 78 Ga. Appeals 292 ..... 8, 17, 23, 25, 33

Scripps Howard Radio v. *Federal Communications Commission*, 316 U. S. 4 31

Southwestern Bell Telephone Co. v. *Oklahoma*, 303 U. S. 206 15

State of Georgia v. Regents of the University System of Georgia, 179 Ga. 210 2

L. B. Wilson, Inc. v. Federal Communications Commission, 170 F. 2d, 793 26

Yankee Net Work v. *Federal Communications Commission*, 107 F. 2d, 212 30

STATUTES CITED

Georgia Code of 1933, Section 6-1606 32

TEXT CITED

55 Corpus Juris 1055, § 1043 (b) 18

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W. E. CARROLL, CLARENCE H. CALHOUN, MRS. HATTIE PICKARD, MRS. EMMA B. MOORE, and SAM PICKARD, Trustee for Sam Pickard, Jr.,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR RESPONDENTS

Preliminary Statement.

Regents of the University System of Georgia, defendant in the State court suit, hereinafter referred to as "The Regents," is a corporation under the laws of Georgia and has the power to make contracts and to

incur debts. *State of Georgia* v. *Regents of the University System of Georgia*, 179 Ga. 210.

Southern Broadcasting Stations, Inc. was also a Georgia corporation. All of its capital stock was, at the time of the making of the contract which formed the basis of the suit in the State court (Record 12 to 16), owned by the respondents who were plaintiffs in the State court suit. Southern Broadcasting Stations, Inc. owned physical and intangible property consisting, among other things, of various broadcasting facilities necessary and useful in the operation of a radio broadcasting station. It never owned, or claimed, a license for the operation of a broadcasting station.

The Regents, being in need of the property owned by Southern Broadcasting Stations, Inc. for the operation of Station WGST, which was owned and controlled by the Regents, purchased from the respondents all of the capital stock of Southern Broadcasting Stations, Inc. under the contract above referred to. The reason for said purchase and the manner in which the Regents liquidated the corporation and thus acquired the ownership of the assets thereof are clearly and accurately set forth in a statement by the Regents themselves (R. 56-63). The following is quoted from that statement:

> "(a) Applicant is a state-supported institution of higher learning and a constituent part of the University System of Georgia. All institutions within the University System are under the direction and management of a Board of Regents which by statute is an instrumentality and department of the government of the State of Georgia. The 'Regents of the University System of Georgia' is the name of a public corporation authorized to acquire and hold property in trust for the respective institutions subject to the management and

direction of said Board. The Board of Regents is also the governing body of this public corporation.

"(b) In pursuance of the conclusions of the Federal Communications Commission, the Regents of the University System of Georgia, in its corporate capacity, undertook to acquire for and on behalf of applicant, Georgia School of Technology, all physical assets belonging to Southern Broadcasting Stations, Inc., necessary for and incidental to the operation of said broadcast station. These negotiations resulted in the consummation of a contract between the then stockholders of Southern Broadcasting Stations, Inc. and said Regents. Copies of the contract are of file with the Commission. The Nine Thousand Eight Hundred and Twenty-Four (9,824) Shares referred to in this contract were delivered to the Regents by the stockholders on or about May 22, 1943. These shares constituted all of the outstanding stock of Southern Broadcasting Stations, Inc. Applicant thus acquired control over radio station WGST.

"(c) This control was exercised on June 7, 1943 by the election of a new Board of Directors, representing applicant. The new Board accepted the resignations of all former officers of Southern Broadcasting Stations, Inc. and, in turn, elected its own official personnel. Action was immediately taken by the new Board to liquidate Southern Broadcasting Stations, Inc. and to surrender its charter.

"(d) The liquidation was effected by transferring the assets of the corporation to Regents of the University System of Georgia, which accepted the transfer in trust for the exclusive use and benefit of applicant. The physical assets so transferred are set forth and contained in Exhibit 'A' of the contract effective April 15, 1943. The remain- [fol. 65] ing assets which were transferred

consisted of specific items mentioned in the transfer itself (a copy of which is of record) as well as cash and receivables accruing from the operation of the station since April 14, 1943. The financial condition of the corporation as of April 15 appears of the record. No debt of Southern Broadcasting Stations, Inc. which accrued prior to April 15, 1943, was assumed by applicant.

"(e) The Superior Court of Fulton County accepted the surrender of the charter of Southern Broadcasting Stations, Inc. on or about July 9, 1943 after a showing satisfactory to the Court, that the corporation's liabilities and assets had been properly disposed of and that the surrender of its charter would be without prejudice to the rights of any stockholder or creditor.

* * * * *

"(h) The contract between the Regents and the former stockholders of Southern Broadcasting Stations, Inc. provides that the latter are to receive in payment for their shares of stock an amount equivalent to fifteen (15) percent of the collections of the station's net billings for a period beginning April 15, 1943 and ending January 6, 1950.

"[fol. 66] B. Reasons for Grant of Application Without Hearing

"1. All assets received by applicant or by the Regents on its behalf are fully disclosed in the contract effective as of April 15, 1943. Except as provided therein, no agreement or understanding exists, collaterally or otherwise, with respect to any obligation to or consideration in favor of any former officer, director, or stockholder of the former Southern Broadcasting Stations, Inc., personally or officially, directly or through indirection. This statement is made without reservation

or equivocation. No hearing or investigation could possibly disclose anything remotely to the contrary.

"2. No benefit or right is given to or reserved by any former officer, director, or stockholder of Southern Broadcasting Stations, Inc. under said contract, except the provision for the payment to former stockholders for their shares of stock which they transferred to the Regents of the University System of Georgia, in trust, for the exclusive use and benefit of applicant.

"3. No hearing or investigation could disclose any consideration flowing to any former officer, director, stockholder, or employee of Southern Broadcasting Stations, Inc., not covered by said contract. The extent of the payment, over the period specified in the contract, could now be subject merely to speculation and is beyond the possibility of determination.

"4. It may be possible to ascertain the value of the equipment and assets which were transferred by Southern Broadcasting Stations, Inc. to the Regents but such an appraisal would have little, if any, meaning because of the difficulty which applicant would have encountered in acquiring said equipment from any other source under wartime conditions."

Payments of purchase money accruing under said contract up to and including the month of July 1945 were made, but payments accruing thereafter were not made and the respondents filed suit in the State court for the recovery of the payments which had accrued and which had not been paid.

Summary of the Argument

I. Decision of the Federal question, sought to be raised by the Regents, was not necessary to the decision of the State court. The Regents admitted a *prima facie* case and assumed the burden of establishing the defense which they set up in their answer, to-wit: that the action of the Commission in conditionally denying the application of the Regents for a renewal of the license for Station WGST but "without prejudice . . . to the submission within ninety days of a new application for a construction permit and license . . . , provided it is affirmatively shown that no further effect is given to the agreements between the Georgia School of Technology and Southern Broadcasting Stations, Inc. . . .", excused the Regents from further performance of the contract by reason of the impossibility of their performing the same because of an act of law (R. 129). The contract was to pay for the property, which was sold and delivered to the Regents, "a sum equal to 15 per cent of the net billings" of the station over a certain period. The funds for such payments did not have to come from the operation of the Station. The provision for payments of "a sum equal to 15 per cent of the net billings" established a basis for determining the amounts to be paid; but did not give the respondents a lien on such receipts. The State court held that the Regents failed to carry the burden of establishing the defense of impossibility of performance by reason of an act of law. This ruling of the State court is amply sustained by the general law of contracts and by decisions of this Court.

II. The Regents concede that respondents were entitled to relief; that the Regents had put it out of their power to restore what they had bought from respond-

ents, and that respondents are entitled to "reasonable compensation for what they have given"; that it is "a case for the application of the doctrine of equitable rescission" (Regents' brief, p. 40). The Georgia Supreme Court held that the pleadings of the Regents did not make any case for equitable rescission or other affirmative equitable relief, but that they denied any liability and prayed to "be dismissed hence with (their) reasonable costs" (*Regents of the University System of Georgia* v. *Carroll, et al.*, 203 Ga. 292, 293). The State courts determined, under the pleadings and evidence, that the proper measure of recovery was the amounts stipulated in the contract. These were purely State questions and involved no Federal question. Even if the State court decided these questions erroneously this Court would not review them. But the decisions of the State courts are in harmony with the general rules as established by the authorities, including decisions of this Court.

III. The rulings of the Commission did not purport to relieve the Regents of legal obligations under the contract. Even if it could be assumed that the Commission would, under any circumstances, have the power to authorize an applicant for license to repudiate its private, legal, contract obligations to pay for property which it had bought and converted, the rulings of the Commission in this case could not be construed as having that effect. The Commission has repeatedly held that it does not have jurisdiction over the private contract rights and obligations of parties, even though broadcasting facilities be the subject matter dealt with in such contracts. This Court has clearly defined the law in this respect.

Radio Station WOW v. *Johnson*, 326 U.S. 120;

Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134;

Federal Communications Commission v. *Sanders Bros. Radio Station*, 309 U.S. 470.

The Commission, in a brief filed by it in the Court of Appeals of the District of Columbia (see Appendix A to this brief), construed an almost identical ruling to the one in this case as not having any effect on the private rights of the parties to a contract dealing with a broadcasting station.

IV. Respondents have not collaterally attacked the rulings of the Commission. The suit in the State court related solely to the private contract rights and obligations of the parties. No ruling was sought or had from the State court regarding any question over which the Commission has jurisdiction. The question whether the Commission should grant or deny a license was not before the Court. It is conceded by the Regents, in their brief (p. 16) that "The Commission did not pass upon the validity of the contract as measured by the law of contracts *per se*." The Commission said the same thing, in effect, on page 5 of the Memorandum filed in support of the petition for certiorari.

The State court (78 Ga. App., p. 302) said there was no collateral attack; that respondents "*are simply seeking to enforce a private agreement by suit for breach thereof.*" (Emphasis added.)

V. It would amount to a denial of due process as to respondents to give to the rulings of the Commission the effect which the Regents now contend for. The private contract rights of the respondents could not be adjudicated in the proceedings before the Commission. Decisions of this Court amply sustain this statement.

VI. There was no duty or obligation upon respondents to intervene in the proceedings before the Commission. The Commission could not, and would not have attempted to, adjudicate the private rights and obligations of the parties under the contract. Many rulings of the Commission establish this proposition. This Court has definitely settled that the Communications Act does not confer any such power or jurisdiction on the Commission.

VII. The decision of the State court does not purport to, and does not, decide any question over which the Commission has jurisdiction. The questions whether the Regents were qualified as a licensee were not before the court. If the Commission determined that for any reason the applicant was not qualified, morally, financially or otherwise, the Commission could have denied the application. But the Commission could not authorize the applicant to repudiate its legal obligations in order to thereby become qualified. The State court held nothing more than this with respect to the power of the Commission. The Regents concede in their brief (p. 38) that "aside from the regulatory power of the Commission over radio broadcasting, including contracts affecting the ability of a station to operate in the public interest, the contract would be enforceable under Georgia law." This Court has held that: "The 'public interest' with which the Commission is charged is that involved in granting licenses. Safeguarding of that interest can hardly imply that the interest of States in enforcing their laws against fraud have been nullified insofar as licensed facilities may be the instruments of fraud."

Radio Station WOW v. *Johnson*, 326 U.S. 120.

We submit that the same principle applies to the laws of contracts.

ARGUMENT.

I.

Decision of the Federal Question was not necessary to the judgment of the State Court.

The only defense which the petitioner sought to make in the State court was, as stated by the Georgia Court of Appeals, "to the effect that they are excused as a matter of fact and of law from further performance of this contract by reason of the impossibility of their performing the same because of an act of law" (R. 129). As we have pointed out, the contract was to pay "a sum equal to 15 per cent of the net billings" of the station for a certain period.

The contract to pay a "sum equal to 15 per cent of the net billings" of the station did not give the respondents any interest or share in the receipts from the operation of the station. It simply created a legal obligation upon the part of the petitioner and established a basis for determining the amounts to be paid. *Nutt* v. *Knut*, 200 U.S. 12, 21; *McGowan* v. *Parish*, 237 U.S. 285, 300. The funds for the payments did not have to come from the operation of the station.

In *Nutt* v. *Knut*, 200 U.S. 12, this Court reviewed the judgment of a State court awarding damages for the breach of a contract under which an attorney was employed to prosecute a claim against the United States, the contract providing that the attorney was to be paid "a sum equal to 33⅓ per cent of the amount which may be allowed on said claim, the payment of

which is hereby made a lien upon said claim and upon any draft, money, or evidence of indebtedness which may be issued thereon" (200 U.S., page 13), the suit was defended in the State court upon the ground that the contract was repugnant to a United States statute annulling assignments of such claims or any part or interest therein. The State court decided the case in favor of the plaintiff and rejected the defense sought to be made thereto on the ground above stated. This Court held:

> ". . . We are of the opinion that the state court erred in holding the contract, on its face, to be consistent with the statute.
>
> "It does not follow, however, that for this error, the judgment must be reversed. There is a provision in the contract of 1882 which can stand alone, and which was not in violation of the statute; namely, the one evidencing an agreement on the part of Nutt's executrix to pay to the attorney for his services a *sum equal to 33⅓ per cent of the amount allowed on the claim.* Wylie v. Coxe, 15 How. 415; Wright v. Tebbitts, 91 U.S. 252; Taylor v. Bemiss, 110 U.S. 43. *Such an agreement did not give the attorney any interest or share in the claim itself, nor any interest in the particular money paid over to the claimant by the government.* It only established an agreed basis for any settlement that might be made, after the allowance and payment of the claim, as to the attorney's compensation. It simply created a legal obligation upon the part of the estate, which, if not recognized after the collection of the money, could have been enforced by suit for the benefit of the attorney, without doing violence to the statute or to the public policy established by its provisions. *The decree below may then be regarded as only giving effect to the agreement as to the basis upon which*

the attorney's compensation was to be calculated.

"Finding in the record no error of law as to any question which may be properly reviewed by this Court, the judgment of the State court is affirmed."

(Emphasis added.)

Even if, for any reason, it became improper or illegal for a percentage of the funds derived from the operation of the station to be paid to respondents under the contract, this would not have relieved the petitioner from its duty and obligation to pay for the property which it had received and converted to its own use. And the State court had the power to enforce this obligation.

N. Y. Central & H. R. RR. Co. vs. *Gray*, 239 U.S. 583.

In that case it was held that, although the passage of the Hepburn Act of June 29, 1906, rendered it illegal for a carrier to comply with a contract previously made to furnish transportation in payment of the purchase price of property which it had received, it was within the jurisdiction of the State court to give judgment for the money value of the unpaid purchase price. The Court said (pp. 586-7):

"In Louisville & N. R. Co. v. Mottley, 219 U.S. 467, 476, et seq., it was held that the prohibition we have quoted prevented the exchange of transportation for services, advertising, releases, property, or anything else than money, and that this operated upon an agreement made long before the passage of the act, whereby the carrier, in consideration of a release of damages for injuries sustained by Mottley and his wife in consequence of a collision of trains upon the railroad, agreed to issue free passes to them, renewable annually dur-

ing their several lives, the result being that after the taking effect of the Hepburn Act specific performance of this agreement could no longer be required. . . .

"In the present case, therefore, the railroad company acted strictly in accordance with the law when it refused any longer to furnish transportation to defendant in error in performance of the contract of November, 1900. *But from this it by no means follows that it could refuse to make just compensation in money for the unpaid balance of the purchase price of the map.* The judgment of the state court proceeded upon the ground that since the contract had been fully performed by Gray, so that the railroad company had received the entire benefit of it, and since the delivery of the particular consideration stipulated for had been prohibited by the act of Congress, the company thereupon became bound upon general principles of justice to pay him an equivalent in money for the balance of the consideration. *In so holding the court was simply administering the applicable principles of state law, and did not run counter to the act of Congress.* If the court had accorded legal efficacy to an *executory contract made after the taking effect of the Hepburn Act*, and contrary to its provisions, a different question would be presented. *But there is nothing in the act to prevent or relieve a carrier from paying in money for something of value which it had long before received under a contract valid when made, even though the contract provided for payment in transportation, which the passage of the act rendered thereafter illegal.* In the Mottley case, while the right to further specific performance of the contract for free passage was denied, the court said (219 U.S. 486): 'Whether without enforcing the contract in suit, the defendants in error may, by some form of proceeding against the railroad com-

pany, recover or restore the rights they had when the railroad collision occurred, is a question not before us, and we express no opinion on it.'" (Emphasis added.)

II.

The petitioner conceded that respondents are entitled to relief. The relief granted was within the competence of the State Court.

In their brief in support of the petition for certiorari counsel say (p. 40):

> "It is not the contention of the petitioner that the respondents in these circumstances should be remediless. It has never been the position of petitioner that it could keep what it has received from the respondents and give nothing in return. It does contend that under the circumstances it is not obligated to perform the contract in the sense that it is now required to pay for what it has received the strict measure of consideration called for by the terms of the contract itself. To do so would conflict with the decision of the Commission and be contrary to the public interest. (L. & N. R.R. Co. v. Mottley, 219 U.S. 467.) The solution must be found in the equities of the situation. In other words, respondents should receive fair and reasonable compensation for what they have given, even though they cannot enforce the contract itself. This is clearly a case for the application of the doctrine of equitable rescission."

The Supreme Court of Georgia, in the decision transferring the case to the Court of Appeals (*Regents of the University System of Ga.* v. *Carroll, et al.*, 203 Ga. 292, 293), held that petitioner (plaintiff in error in that court) did "not ask for rescission or pray for any *affirmative* equitable or legal relief, * * * but to the con-

trary the answer, after setting forth that the defendants were no longer permitted to comply with their contract, merely prays that they 'be dismissed hence and with (their) reasonable costs.'" The Supreme Court and the Court of Appeals held that the action was for the recovery of damages for breach of contract and that the only defense set up by petitioner was that performance of its obligation to pay the amounts called for by the contract had been rendered impossible, and that the breach was therefore excused. The State courts held that this defense was not made good by petitioner which admitted a prima facie case and assumed the burden. The question of the amount to be recovered was purely a State question, and involved no Federal question. And even though this Court should think the State court decided this question erroneously, it is a matter over which it will not take jurisdiction.

Klinger v. *Missouri*, 13 *Wall.* 257, 263.

Radio Station WOW v. *Johnson*, 326 U.S. 120, 129;

Lynch v. *New York, ex rel.*, 293 U.S. 52, 54-55;

Southwestern Bell Telephone Co. v. *Oklahoma*, 303 U.S. 206, 212-213;

Leathe v. *Thomas*, 207 U.S. 93, 98-99.

In *Klinger* v. *Missouri*, supra, this Court said (13 Wall., p. 263):

". . . Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the Federal

question, this court will not take jurisdiction of the case, *even though it might think the position of the state court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case;* but if such independent ground was not a good and valid one, it will be presumed that the state court based its judgment on the law raising the Federal question, and this court will then take jurisdiction. Maguire v. Tyler, 8 Wall. 650; Neilson v. Lagow, 12 How. 110; R. Co. v. Rock, 4 Wall. 177; R. Co. v. McClure, 10 Wall. 511; Ins. Co. v. Treas., ante, 112; Crowell v. Randell, 10 Pet. 368; Suydam v. Williamson, 20 How. 427; Williams v. Oliver, 12 How. 123." (Emphasis added.)

In *Lynch* v. *New York ex rel. Pierson*, supra, this Court said (293 U.S., p. 54):

"... Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. . . .

"As the record fails to show jurisdiction in this Court, the writ of certiorari is dismissed as improvidently granted."

The ruling just quoted from *Lynch* v. *New York*, supra, was quoted approvingly in *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 129, where this Court said that "this Court will not review a State court decision resting on an adequate and independent non-Federal

ground *even though the State court may have also summoned to its support an erroneous view of Federal law.*" (Emphasis added.)

It will be observed, as the Court of Appeals of Georgia pointed out (78 Ga. Appeals, page 293), that the contract was for the payment of purchase money in "a sum equal to 15 per cent of the net billings of the radio station." The holding of the Court of Appeals is summarized by that court (78 Ga. Appeals, page 303) as follows:

> ". . . What we hold, and nothing more, is that, under the pleadings and agreed facts, the trial judge correctly found that there had been an unexcused breach by the regents of the contract of April 15, 1943, and that the regents were liable to the plaintiffs under said contract for such breach for the 15 per cent of the net billings received from the operation of said radio station from August 1, 1945, to the filing of this suit, or as found by the trial court, for damages of $144,968.63 principal, and $10,991.31 accrued interest, being 15 per cent of the net billings during such time."

The Supreme Court of Georgia held, as pointed out above, that even if, as they now contend, the Regents would have had a case for "equitable rescission," or for "affirmative equitable relief" they failed to file the proper pleadings therefor under Georgia practice. Clearly this ruling does not involve any Federal question.

National Foundry & Pipe Wks. v. *Oconto City Water Supply Co.*, 183 U.S. 216, 237;

Grand Rapids & I. R. Co. v. *Butler*, 159 U.S. 87, 91;

Allen v. Alleghany Co., 196 U.S. 458, 466.

This Court, on reviewing a judgment of a state court, will consider only such defenses as involve Federal questions.

Central New England R. Co. v. *Boston & A. R. Co.*, 279 U.S. 415, 417.

It was, and is, conceded that the respondents had the right to compensation; that the Regents were liable for what "it has received from respondents." The State courts held that under the pleadings and evidence the amount of recovery was properly determined according to Georgia law.* The measure of recovery as applied by the State courts is in accord with the general law, 55 C. J., page 1055, § 1043 (b), and is in accord with the decisions of this Court, *Nutt* v. *Knut*, supra; *McGowan* v. *Parish*, supra.

We therefore respectfully submit that the decision of the State court rests on adequate non-Federal grounds.

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*The Georgia decisions are clear that the measure of damages for breach of a contract to pay for property sold and delivered is the agreed contract price. *McCarthy v. Nixon Grocery Co.*, 126 Ga. 762 (4); *Owens v. Fuller*, 27 Ga. App. 368; *Palmer v. Knoxville Lumber Co.*, 27 Ga. App. 386; *Martin v. McLain*, 51 Ga. App. 336; *Goodrum Tobacco Co. v. Potts-Thompson Liquor Co.*, 133 Ga. 776.

III.

The rulings of the Federal Communications Commission did not purport to relieve the Regents of their legal obligation to pay for the property which they had bought from respondents.

Even if it could be assumed that the Commission would under any circumstances have the power to authorize an applicant to repudiate its legal obligations binding under state law to pay for property which such applicant had bought and converted to its own use, we insist that the action of the Commission in this case cannot properly be construed as having that effect or as intended by the Commission to have that effect. To place such construction upon the rulings of the Commission would be utterly inconsistent with numerous decisions of the Commission itself with respect to its power to make such a ruling or order.

In re: Leese et al., 5 F.C.C. 364, 365;

In re: City of Atlantic City, 7 F.C.C. 485, 489;

In re: Hearst Radio, Inc., 7 F.C.C. 292, 295;

In re: Buffalo Broadcasting Corporation, 9 F. C.C. 31;

In re: Assignment of License of Station WMCA, 10 F.C.C. 241.

These rulings of the Commission are discussed in more detail in Section VI of this brief.

The property which the Regents bought from the respondentswas all the stock of a Georgia corporation. The corporation owned valuable physical and intangible property but no license or interest in a license. The Regents, after purchasing the stock of the corporation,

liquidated the corporation and had it dissolved, thus placing it beyond the possibility to restore what they had gotten from respondents. The obligation of the Regents was to pay for this property in installments. The payments were to be amounts "equal to 15 per cent of the net billings" of the station for a definite number of months. What these payments would ultimately amount to were then "beyond the possibility of determination" (R. 59), but the formula for determining the amount of the payments was definite.

This Court had held that the Commission does not have any "supervisory control of the * * * business management" of licensees, *Federal Communications Commission* v. *Sanders Brothers*, 309 U.S. 470, 475; and it had held that the Communications Act is not designed "as a new code for the adjustment of conflicting private rights * * *", *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138.

In view of the repeated rulings of the Commission itself and of the rulings of this Court, just above referred to, it is respectfully urged that the rulings of the Commission relied upon by petitioner in this case cannot properly be construed as having the effect which petitioner seeks to give them. We are further fortified in this by what the Commission itself has said. In a memorandum of the Commission filed in support of the petition for the writ of certiorari in this case (and served upon us after the writ was granted) it is stated (page 5): "The features of the contract passed upon by the Commission were not its validity under requirements of the law of contracts, or any other body of law exclusively concerned with the private rights and duties of the parties . . ."

In the brief of petitioner it is stated (page 24): "The Commission did not attempt to pass upon the validity of the contract as measured by the law of contracts *per se* . . ."

The ruling of the Commission in this case insofar as it purports to require that "no further effect be given to the contract" is worded almost exactly like the one made by the Commission in the matter which was dealt with in *Churchill Tabernacle* v. *Federal Communications Commission*, 160 F. (2nd) 244. In that case the Commission said that its ruling did not have the effect of adjudicating the "private rights of the parties under the contract" and should not be so construed; that those were matters "properly cognizable in another forum."*

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*In *Churchill Tabernacle v. Federal Communications Commission*, 160 F. 2d, 244, the case there being dealt with grew out of a contract under which the Church, the owner of Station WKBW, sold the station to a corporation. In this contract of sale, the vendor reserved to itself the sole and absolute use of broadcasting periods for certain hours on Sundays and Mondays. In addition, the contract provided that the corporation would pay the vendor certain amounts weekly for a period of years and it provided that in the event the corporation failed to carry out the conditions of the contract "all the right, title and interest in the property, including the operating license, would, upon written notice, revert to" the vendor. The Commission, in acting upon an application for renewal of license, held that the contract, which as above stated, among other things, reserved to the vendor the absolute use of broadcasting periods, was in violation of Section 310 (b) of the Act and, as stated in the report of the case (160 F. 2d, page 246):

"On the basis of this finding the application for renewal

The license which was granted to the Regents on March 7, 1946 (R. 81) does not contain any condition or restriction concerning the payment by the Regents for the property which it had bought from respondents, and which embraced the very facilities which the Regents were then using for the operation of the station.

We therefore respectfully urge that the rulings of the Commission quoted and relied upon by petitioner cannot properly be construed as an attempt by the Commission to authorize the Regents to repudiate the legal obligations arising under the contract.

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was denied, but without prejudice to the licensee corporation to file a new application when it should be able to show that it would thereafter have the exclusive use and control of the station, and that no further effect would be given to the agreement with the Church."

The vendor which had intervened before the Commission appealed and the Commission, in its brief filed in the Court of Appeals, took the position that its ruling denying the application "without prejudice to the licensee corporation to file a new application when it should be able to show that it would thereafter have the exclusive use and control of the station, and that no further effect would be given to the agreement with the Church" did not have any effect on the contract provisions with respect to the payments to be made thereunder and the reverter of the physical properties as provided in the contract; that these were matters for determination in "another tribunal." See 160 F. 2d, page 247. That part of the brief filed by the Commission above referred to is set out in full as "Appendix A" to this brief. The position of the Commission, as stated in that brief, is squarely in line with our position in this case.

IV.

The respondents did not collaterally attack the rulings of the Commission.

The suit in the State court was simply and purely for the enforcement of the private rights under the contract. It was, in no way, an attack upon the Commission's rulings. The Commission had not attempted to pass upon the validity of the contract "under requirements of the law of contracts, or any other body of law exclusively concerned with the private rights and duties of the parties." For this statement we have the words of the Commission itself (See page 5 of the Memorandum filed by the Commission in support of the petition for writ of certiorari). The Regents, in their present brief, state (p. 16): "The Commission did not pass upon the validity of the contract as measured by the law of contracts *per se* . . ." The Court of Appeals of Georgia stated (78 Ga. App., p. 302): "The plaintiffs are not collaterally attacking the order and decision of the Federal Communications Commission by petition in Fulton Superior Court. *They are simply seeking to enforce a private agreement by suit for a breach thereof.*" (Emphasis added.) Any question as to whether the Commission should have granted or refused a license to the Regents, or whether it should allow the Regents to operate the station in the future, was not involved in the State court proceedings. The State courts fully recognized, and conceded, that the granting or refusing a license was a matter over which the Commission has exclusive jurisdiction.

V.

To give to the rulings of the Commission the effect which the Regents contend should be given thereto would amount to a denial of due process as to respondents.

Respondents were not parties to any of the proceedings before the Commission in which the rulings now relied upon by the Regents were made. And, as we will point out, it is extremely doubtful, under numerous rulings of the Commission, whether respondents could have intervened and become parties in those proceedings. At any rate they did not intervene and were not parties.

> "It is elementary that it is not within the power of any tribunal to make a binding adjudication of the rights in personam of parties not brought before it by due process of law. Pennoyer v. Neff, 95 U.S. 714; Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189."
>
> *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 362.*

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*In commenting upon the decision of this Court in *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, (Regents' brief, pp. 37 and 40) it is argued that that decision is authority for the propositions that respondents are precluded as to their rights under the contract though they were not parties to the proceedings before the Commission and that the state courts cannot compel "specific performance" of the contract. In reply to this argument we respectfully submit:

(a) In the *National Licorice* case, this Court took particular pains to make it clear that the *private contract rights* of the absent parties should not be affected. The Court, after pointing out that

". . . It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, *until he has been duly cited to appear, and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

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it is elementary that the "rights in personam of parties not brought before it by due process of law" could not be adjudicated by any tribunal, said (309 U.S. 362): "The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights . . . It has few of the indicia of a private litigation . . . (p. 363) Ordinarily where the rights involved in litigation arise under a contract, courts refuse to adjudicate the rights of some of the parties to the contract if the others are not before it . . . Such a judgment or decree would be futile if rendered, since the contract rights asserted by those present in the litigation could neither be defined, aided nor enforced by a decree which did not bind those not present." In order to remove any semblance of doubt the Court required that the Board's order, requiring notices to be posted be modified to the extent of striking out that part which stated that the contracts are "void and of no effect" and inserting in the notice a statement that "this is without prejudice to the assertion by the employees of any legal rights they may have acquired under such contracts" (309 U. S. 369).

(b) The suit in the State court, in this case, was not one for specific performance. The Supreme Court of Georgia so held (*Regents of the University System v. Carroll*, 203 Ga. 292), and the Court of Appeals so held (78 Ga. App. 292).

Galpin v. *Page*, 18 Wall. 350, 368-9.

See also:

L. B. Wilson, Inc. v. *F. C. C.*, 170 F. 2d 793, 802.

VI.

As to the right, or duty, of Respondents to have Intervened in the Proceeding before the Commission.

It is argued on behalf of the Regents that the respondents had actual knowledge of the proceedings before the Commission and could have intervened therein, and that they could have appealed from the rulings of the Commission. This suggests the question as to what relief the respondents could have sought if they had intervened. Could they have sought and obtained an adjudication of their private rights under the contract? Section 1.102 of the rules of the Commission (R. 97) provides: "Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, *the facts on which the petitioner bases his claim that his intervention will be in the public interest . . .*" (Emphasis supplied.) It seems clear that this does not contemplate the injecting of issues concerning purely private rights under contracts where such contracts do not purport to deal with any license to operate a radio station. The Commission has held this many times.

In re: Application of Station WMCA, 10 F.C.C. 241; the Commission was dealing with an application for consent to the assignment of license of Station WMCA. Donald Flamm sought to intervene in the proceeding setting up in his petition for permission to intervene that he had an action pending in the Supreme Court of the State of New York for rescission of the sale by

him to Edward J. Noble of the physical properties of Station WMCA on the ground of fraud, duress, conspiracy and undue influence. He sought permission to intervene in order to show that the application for the transfer of the license should be held up until the court could act in the suit which he had pending for the rescission of the sale of the physical properties. The Commission denied the petition of Flamm to be allowed to intervene, the Commission saying (10 F.C.C. at page 242):

> "The instant petition to intervene must be denied. The only claim set forth as a basis for intervention is that if the petitioner should prevail in his pending suit against Noble, and if the court should order rescission as prayed, the Commission, by consenting to the assignment, will have disabled Noble from complying with the court's order and rendered its judgment of no force and effect. Basically, therefore, the petition to intervene is simply a request that the Commission refuse to consent to the assignment of license until a final judgment is rendered in the pending action; in practical effect petitioner seeks here the relief denied him by the court's refusal of an injunction *pendente lite.*
>
> "*As a legal matter, however, petitioner's argument misconceives the respective jurisdictions of the court and this Commission. On the one hand, the court has exclusive jurisdiction to decide the issues involved in the pending litigation and to grant any relief to which petitioner may be entitled with respect to the physical properties and other assets of Station WMCA. The Commission has no power to act with respect to these matters*

*and any action it takes in the present proceedings will not affect the Court's jurisdiction."** (Emphasis supplied.)

In the Matter of Hearst Radio, Inc. et al., 7 F.C.C. 292, one of the matters involved is stated as follows (p. 294):

> "By contract bearing date of May 10, 1938, Earle C. Anthony, Inc., agreed to sell to Worcester Broadcasting Corporation the transmitting plant of Radio Station KECA, Los Angeles, Calif., including the land upon which the transmitting plant is located, all the buildings on said land and contents thereof, the transmitter, antenna tower, and all electrical, mechanical, and other equipment used in operating said plant, for the sum of $97,500 to be paid $25,000 in cash after approval of the sale by the Commission, the remainder to be paid at the rate of $10,000 per year for the first six years and $12,500 the seventh year. . . ."

With respect to this the Commission held (p. 295):

> "Insofar as Earle C. Anthony, Inc., may desire to dispose of its station equipment and other physical property which is no longer useful to it because of the acquisition of Station KEHE, and the surrender of its license to operate the facilities of KECA, the consent of the Commission is not necessary. . . ."

In the Matter of City of Atlantic City, 7 F.C.C. 485, the Commission held (p. 489):

> "The contract between the city of Atlantic City and the Greater New York Broadcasting Corpo-

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*For the convenience of the Court we are attaching as "Appendix B" to this brief the entire report of this case.

> ration in so far as it deals with the purchase of the equipment of Station WPG is a matter of private concern between the city of Atlantic City and the Greater New York Broadcasting Corporation and does not require Commission consent or approval. . . ."

In re Petition on behalf of Fannie I. Leese, et al., 5 F.C.C. 364; the Commission having under consideration a petition on behalf of Fannie I. Leese, et al for permission to sell to a licensee all of the stock of a corporation which owned certain radio equipment used in connection with the broadcasting station, held (p. 365):

> "Accordingly, upon consideration of the petition, the Commission is of the opinion and so finds that insofar as any sale or transfer of control of stock involving the physical equipment of radio Station WMAL is concerned, neither Section 310 (b) of the Communications Act of 1934, nor any other provision of that Act prohibits such transfer, nor does the Commission have jurisdiction with regard to the matters presented in said petition on the basis of the facts therein stated."

In the Matter of Buffalo Broadcasting Corporation, 9 F.C.C. 31, the Commission, having under consideration the petition of Churchill Tabernacle "to be made a party intervener and for affirmative relief," in which petition the Churchill Tabernacle, among other things, set up that it had sold to Buffalo Broadcasting Corporation the physical properties connected with the operation of Station WKBW, including the buildings, machinery and the land on which the station was then located and that the Buffalo Broadcasting Station had later removed the station to another location without paying or securing the balance of the purchase money. The petition sought an order from the Commission

to require the Buffalo Broadcasting Corporation to give petitioner security on the equipment and station property at the new location in lieu of the security which it had held on the property at the former location, and the petition alleged "that petitioner's interest will have been aggrieved and adversely affected" unless such relief were granted to it. The Commission held (p. 32):

> "It further appearing that the enforcement of the aforesaid provision in the May 1931 contract between petitioner and Buffalo Broadcasting Corporation with respect to security required thereunder from Buffalo Broadcasting Corporation to petitioner is a matter over which the Commission has no jurisdiction; and
>
> "It further appearing that petitioner has not shown that it is aggrieved or adversely affected by any action of the Commission.
>
> "Now, therefore, it is ordered, that the petition filed October 1, 1941, by Churchill Tabernacle, Buffalo, N. Y., 'to be made a party intervener and for affirmative relief,' be, and it is hereby, dismissed, without prejudice to any contract or property right of petitioner or its rights to proceed before other tribunals."

We also call attention, at this point, to the brief filed by the Commission in *Churchill Tabernacle* v. *Federal Communications Commission*, 160 F. 2d. 244, which has been quoted in "Appendix A" to this brief.

The section of the statute permitting an appeal by "any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application," is not to be given its broadest literal meaning. *Yankee Net*

Work v. *Federal Communications Commission*, 107 F. 2d. 212, 215.

In *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, this Court held that nothing in the Communications Act gives the Commission jurisdiction to deal with the private rights and obligations of parties even though "licensed facilities are involved," if no rights under a license are involved; that "The 'public interest' with which the Commission is charged is that involved in granting licenses."

Persons allowed to appeal as "persons aggrieved or whose interests are adversely affected" by action of the Commission have standing only as representatives of the public interest.

> *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U.S. 4, 14.

In view of the above rulings, both of this Court and of the Commission, we respectfully submit that there was no duty on the respondents to intervene in the proceedings before the Commission; that the Commission would not, and could not, have dealt with the private rights and obligations as between the Regents and respondents; that these were matters to be passed upon by "another tribunal."

VII.

The decision of the Georgia court does not purport to, and does not, decide any question over which the Commission had jurisdiction.

It is conceded by every one, and was conceded by the Court, that the Commission has full power and authority to decide all relevant questions necessary to deter-

mine whether an application for a license should be granted; that among these is the question whether the applicant is financially qualified; that if the applicant is found not to be qualified financially or otherwise, the Commission may deny the application and refuse the license. It was not, and is not, conceded that if an applicant is found to be financially disqualified, the Commission could remove such disqualification by authorizing or directing the applicant to repudiate its legal obligations and thereby become qualified.

There was no issue or question involved before the State court as to whether the Commission should or should not have granted the license to the Regents or whether the Commission should or should not take action to terminate or revoke the license.

In the brief of counsel for the Regents disconnected sentences and portions of sentences from the opinion of the Court of Appeals are quoted in an effort to show that that court undertook to decide whether the applicant, the Regents, was financially qualified. But we respectfully submit that the decision, when read as a whole, does not justify the contention that the court decided or undertook to decide the questions over which the Commission has jurisdiction.

In Georgia, the headnotes to decisions of the appellate court are prepared by the court. *Section* 6-1606 *of the Georgia Code of* 1933 is as follows:

> "No decision shall be delivered ore tenus; but the same shall be announced by a written synopsis of the points decided, which shall be delivered during the term at which the decision was made. No decision shall be published in the reports until the

said decision shall have been revised by each of the judges presiding in the case."

The headnotes to the decision rendered by the Court of Appeals in this case (*Regents of the University System of Georgia, et al.*, v. *Carroll, et al.*, 78 Ga. Appeals, 292) are as follows:

"Radio broadcasting is an instrumentality of interstate commerce and subject to regulation under the provisions of the commerce clause of the United States Constitution.

"The Federal Communications Commission is an administrative agency of the Federal Government, empowered to enforce the provisions of the Communications Act of 1934 (47 U.S.C.A., § 151, et seq.), and has the power and authority to grant or refuse licenses to radio-broadcasting stations, with a view to subserving the public interest so that the people shall have the best possible radio service; but nothing in the power granted to the commission, or in said communications act of Congress, gives to the commission the power and authority to regulate the private contracts and business of those operating radio-broadcasting stations, where the same is not necessary in the protection of the public interest, and where such contracts do not affect the interstate transactions of the radio station."

It will thus be seen that the points decided by the Court of Appeals are:

(a) That radio broadcasting is an instrumentality of interstate commerce and subject to regulation under the commerce clause of the United States Constitution;

(b) The Federal Communications Commission is an administrative agency of the Federal government

empowered to enforce the provisions of the Communications Act;

(c) That the Commission has the power and authority to grant or refuse licenses to radio broadcasting stations with a view to subserving the public interests so that the people shall have the best possible radio service;

(d) But that nothing in the power granted to the Commission or in the Communications Act gives to the Commission the power and authority to regulate the private contracts and business of those operating radio broadcasting stations where the same is not necessary in the protection of the public interest, and where such contracts do not affect interstate transactions of the radio station.

We respectfully submit that everyone of those propositions is sound and amply supported by decisions of this Court as well as by rulings of the Commission itself.

Radio Station WOW v. *Johnson*, 326 U.S. 120;

Federal Communications Commission v. *Sanders Bros.*, 309 U.S. 470, 475;

Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138.

See the rulings of the Commission cited and discussed in Section V. of this brief.

Counsel for the Regents argued to the effect that, when the Commission ruled that the contract obligations of the Regents, valid and binding under Georgia law, rendered the Regents financially disqualified in the opinion of the Commission, and tentatively denied the application for renewal of the license and "further

proposed that a new application might be made provided it is affirmatively shown that no further effect is given to the agreements between the Georgia School of Technology and Southern Broadcasting Stations, Inc. . . ."* that this amounted to a ruling by the Commission that the Regents could and should repudiate its legal obligations and thus become qualified as a licensee.

It is conceded by the Regents that "aside from the regulatory power of the Commission over radio broadcasting, including contracts affecting the ability of a station to operate in the public interest, the contract would be enforceable under Georgia law" (Regents' brief, p. 38). The effect of this argument seems to be that the Commission has the power to authorize an applicant to repudiate its obligations, legal and binding under State law, whenever the Commission decides that such obligations are so burdensome upon the applicant as to render the applicant financially disqualified as a licensee and that such determination by the Commission is binding upon the creditors of the applicant and on the State courts. We respectfully, but most earnestly, disagree with this proposition. We do agree, and have never taken a contrary position, that if the applicant is financially embarrassed to such an extent as not to be qualified as a licensee, then the Commission can refuse to grant a license. The decision of the Georgia court in this case fully recognizes that this power vests in the Commission.

In the memorandum filed by the Commission in support of the petition for writ of certiorari (p. 4) it is

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*Memorandum of the Commission filed in support of the petition for certiorari pp. 2 and 3.

stated: "The decision thus nullifies the action of the Commission in refusing to grant a radio license to petitioner except on condition that the contract be terminated. To permit a State court so to disregard or override the orders of a Federal agency would frustrate the operation of the federal statute, and violate the basic teachings of the Supremacy Clause."

The implication in this argument just quoted, is, to us, startling. The implication seems to be that the refusal by the Commission to grant a license to applicant except on condition that the applicant repudiate its legal obligations is tantamount to authorizing such repudiation and places it beyond the power of the State courts to grant any relief. We had not heretofore understood that the "Supremacy Clause" meant any such thing.

In commenting upon the decision of this Court in *Radio Station WOW v. Johnson*, 326 U.S. 120 (Regents brief, p. 30), it is stated that the decision has no bearing upon the instant case for the reason that there the Commission had not passed upon "the issue of constructive fraud . . . with respect to the public interest." The argument seems to be to the effect that if the Commission had passed upon that issue, the jurisdiction of the State court would have been ousted and that the court could not have decreed as it did in that case that the property which had been fraudulently obtained should be restored, if the Commission itself had determined that it was in the public interest that the property should not be restored to those from whom it had been obtained by fraud. We do not understand the decision of this Court to be so limited. The Court said:

". . . *The 'public interest' with which the Com-*

mission is charged is that involved in granting licenses. Safeguarding of that interest can hardly imply that the interest of States in enforcing their laws against fraud have been nullified insofar as licensed facilities may be the instruments of fraud."
(Emphasis added).

It is argued (Regents brief, p. 33): "The parties to the contract knew that they were dealing upon a subject controlled by federal law, and the legal principle is clear that they are presumed to intend to contract with reference to the provisions of that law." We know of no federal law which controls the rights of parties to contract for the purchase and sale of the capital stock of a state corporation even though the corporation owns property which is useful, or essential, in the operation of a radio broadcasting station, no license being involved. This Court has held that the Communications Act contains no such provision.

Radio Station WOW v. Johnson, supra;

Federal Communications Commission v. Pottsville Broadcasting Co., supra.

CONCLUSION.

In conclusion, we respectfully urge: the State court has not decided, or undertaken to decide, any question over which the Commission has jurisdiction; the respondents have not sought to collaterally attack the rulings of the Commission; the matters involved in the State court were purely and simply the private contract rights and duties of the parties over which the Commission has no jurisdiction and has repeatedly so held; the decisions of this Court have definitely settled the principle that the Communications Act was not in-

tended to and does not oust the State courts of jurisdiction over the private rights and duties of the parties, even though broadcasting facilities may be involved. We respectfully urge that the decision of the State court rests on adequate non-federal grounds and that there is nothing in the case which would warrant this Court in entertaining jurisdiction and interfering with the State court decision.

We again respectfully remind the Court that it is conceded by counsel for all parties to this case that respondents are entitled to relief. The form and extent of the relief to which respondents are entitled under the pleadings and evidence were a matter to be determined by state law and procedure and do not involve a federal question.

Respectfully submitted,

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APPENDIX A.

(Section III of Brief for Federal Communications Commission, in the case of *Churchill Tabernacle vs. Federal Communications Commission, Case No.* 9249 *in the U. S. Court of Appeals, District of Columbia.* The decision in the case is reported in 160 F. (2d) 244.)

"III

"The Commission in its decision has only passed upon issues relating to the public interest in the exercise of its licensing powers and has not adjudicated the private rights of the parties under their contract.

"In holding that an improper surrender of the statutory responsibility of a licensee is imposed by those provisions of the contract which reserve time for appellant's sole and absolute use and disposition, the Commission has determined that it is not in the public interest to make a grant to a licensee whose exercise of discretion in the operation of the station would be curtailed by the obligations to make specific performance of these provisions in the manner contemplated by the contract. The Commission has not, however, undertaken to pass upon the private rights of the parties under the contract. Proceedings undertaken by the Commission in the exercise of its licensing functions are not for the adjudication of private rights. "The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication." *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138. A determination of the Commission that a contract en-

tered into by a licensee contains features which involve an improper surrender of his statutory responsibility may preclude the grant of a license subject to specific performance of those features which are inconsistent with the principles of licensee responsibility established by the Communications Act. It would not, however, foreclose the parties from taking any other action to secure an adjudication on their contracts, nor prejudice their rights in the event of such adjudication. See *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350, 365.

"The Commission has consistently held that so far as contracts between licensees and others do not have as their subject matter the rights conferred by a license or do not substantially affect such rights, it is not within the scope of the Commission's functions to pass upon them. Thus, it has held that contracts for the sale of broadcasting facilities which do not involve transfer of the license itself or rights conferred by it, are matters of private concern and do not require Commission consent or approval. *M. A. Leese*, 5 F.C.C. 364 (1938); *Hearst Radio, Inc.*, 7 F.C.C. 292 (1939); *City of Atlantic City*, 7 F.C.C. 485 (1939). Similarly, the Commission has declined to pass on controversies between the parties arising out of agreements relating to the physical properties of a broadcasting station. Thus, with respect to the very contract of 1931 here involved, the Commission has declined to determine whether a new transmitter and site purchased by the licensee are subject to the appellant's lien and right of reverter of physical properties created by the contract. *Buffalo Broadcasting Corporation*, 9 F.C.C. 31 (1941). Similarly, the Commission has taken the view that it has no concern with action between the parties based upon

alleged inadequacy of the consideration for transfer of physical facilities for broadcasting. See *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, and the brief of the Commission in that case (App. Br. Appendix D, p. 15). See also *Station WMCA*, File No. B1-AL-390 (decided November 16, 1943).

"It is thus clear that in determining that a contractual arrangement affects the responsibilities of a licensee in a manner which is inconsistent with the proper exercise of a licensee's responsibility under the Communications Act, the Commission is not adjudicating the private rights of the parties properly cognizable in another forum. Nor has the Commission attempted to do so in this case. Although appellant appears to argue that the Commission's decision requires abrogation of the arrangement for reverter of the physical property in the event of default and for weekly payment to appellant of $150 for the term of the contract, it nevertheless recognizes (Br. 48) that the Commission's conclusions of law do not single out these provisions as inconsistent with the Act and that "the decision may, therefore, properly be held as not intending to rest the denial of licenses upon these provisions or to require their abrogation." For the Commission did not purport to hold those provisions which it found to curtail unduly the licensee's responsibility were illegal and void for the purposes of adjusting the private rights of the parties. Thus, although the Commission in its proposed findings, referred to these provisions as "illegal" (R. 2559) after counsel for appellant on oral argument called the Commission's attention to the significance of such a characterization (R. 2600), the Commission eliminated those references in the final decision (J. A. 155). Therefore, such questions relat-

ing to the private rights of the parties as to whether the licensee's inability to perform the provisions for reservation of the time entitle appellant to damages at law, or constitutes a failure of consideration entitling appellant to restitution or reformation of the contract in equity are questions which the Commission did not attempt to pass on and which are not prejudged or foreclosed by its decision.

CONCLUSION

"For the foregoing reasons, it is respectfully submitted that the appeal should be dismissed.

FEDERAL COMMUNICATIONS COMMISSION,

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General Counsel.

HARRY M. PLOTKIN,
Assistant General Counsel.

MAX GOLDMAN,
PAUL DOBIN,
DEE W. PINCOCK,
Counsel."

APPENDIX B.

(10 F.C.C. 241)

Before the

Federal Communications Commission

Washington, D. C.

IN RE:

Application for consent to the assignment of license of Station WMCA, New York, N. Y., from WMCA, Inc., to Cosmopolitan Broadcasting Corp.

File No.
B1-AL-390

Decided November 16, 1943

Decision and Order

The present proceeding involves application for consent to the assignment of license of Station WMCA, New York, N. Y., held by WMCA, Inc. wholly owned by Edward J. Noble of New York City, to Cosmopolitan Broadcasting Corp. Nathan Straus, of New York City, and Davega City Radio, Inc., own approximately 59 percent and 41 percent, respectively, of the voting stock of Cosmopolitan Broadcasting Corp. The Commission finds that Cosmopolitan Broadcasting Corp. is legally, financially and technically qualified to operate Station WMCA and that the proposed assignment is in the public interest. Accordingly, the Commission consents to the assignment.

Donald Flamm, of New York City, has petitioned

for permission to intervene in the proceedings. The petition alleges that on or about August 10, 1943, he commenced an action in the Supreme Court of the State of New York against Edward J. Noble seeking to rescind the sale of Station WMCA theretofore made by him to Noble, on the ground that said sale was induced by fraud, duress, conspiracy, and undue influence; and prays for permission to intervene in order to show that the Commission should withhold action in the present proceeding until the pending suit "shall have been tried and it shall have been determined whether or not Donald Flamm is entitled to the rescission" of the sale. It appears from the petition that there has been no trial on the merits, that the court has denied an injunction against transfer of Station WMCA by Noble pending determination of the action, and that an appeal from the order of denial is pending.

Petitioner, Donald Flamm, for some time prior to 1941 was sole stockholder of Knickerbocker Broadcasting Co., Inc., licensee of Station WMCA. Pursuant to application by Flamm and Noble, the Commission, on December 17, 1940, granted its consent to transfer of control of the licensee by the sale of all its outstanding stock to Noble. Thereafter, on December 23, 1940, Flamm filed a petition seeking to have the Commission reconsider its action and dismiss the application for transfer of control. The Commission dismissed the petition on January 7, 1941, and Flamm thereafter, on January 17, 1941, transferred the stock to Noble.

The instant petition to intervene must be denied. The only claim set forth as a basis for intervention is that if the petitioner should prevail in his pending suit against Noble, and if the court should order rescission as prayed, the Commission, by consenting to the assign-

ment, will have disabled Noble from complying with the court's order and rendered its judgment of no force and effect. Basically, therefore, the petition to intervene is simply a request that the Commission refuse to consent to the assignment of license until a final judgment is rendered in the pending action; in practical effect petitioner seeks here the relief denied him by the court's refusal of an injunction *pendente lite.*

As a legal matter, however, petitioner's argument misconceives the respective jurisdictions of the court and this Commission. On the one hand, the court has exclusive jurisdiction to decide the issues involved in the pending litigation and to grant any relief to which petitioner may be entitled with respect to the physical properties and other assets of Station WMCA. The Commission has no power to act with respect to these matters and any action it takes in the present proceedings will not affect the Court's jurisdiction.

In the other hand, the Commission has, under the Communications Act of 1934; as amended, exclusive jurisdiction to determine whether, in any particular case, the license of Station WMCA to engage in radio broadcasting should be assigned in the public interest, convenience or necessity. Should petitioner prevail in his action, neither the court nor Noble, acting pursuant to its order, has power to restore the license of Station WMCA to him without consent of the Commission. Commission consent to the proposed assignment, therefore, does not affect any remedy which it is within the court's power to afford.

The petition has a final defect. It seeks to make action in the public interest wait upon the righting of an alleged private injury. The Commission has found

that the proposed assignee is fully qualified to operate Station WMCA in the public interest. No fact which petitioner proposes to establish will in any way reflect upon the desirability of a transfer to the proposed licensee. Consummation of the transfer is not to be held up, perhaps for years, pending the settlement of issues in private litigation unrelated to the proposed operation. Especially compelling in the present case is the fact that Noble, in addition to being sole stockholder of the licensee of Station WMCA, is also the sole stockholder of American Broadcasting System, Inc. (Blue Network), licensee of a 50-kilowatt station (WJZ) which is located in New York City and serves substantially the area served by Station WMCA. Public interest expressed in rule 3.106 against such multiple ownership will, therefore, be directly served by the proposed assignment.

Accordingly, it is ordered, this 16th day of November 1943 that the application for consent to assignment of the license of Station WMCA (B1-AL-390) to Cosmopolitan Broadcasting Corp., be, and it is hereby, granted, and the intervention petition of Donald Flamm be, and it is hereby, denied.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 83

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
Petitioner,

vs.

W. E. CARROLL, CLARENCE H. CALHOUN, MRS. HATTIE PICKARD, MRS. EMMA B. MOORE, AND SAM PICKARD, Trustee for SAM PICKARD, JR.,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF OF RESPONDENTS IN REPLY TO THE BRIEF OF THE FEDERAL COMMUNICATIONS COMMISSION, AMICUS CURIAE.

JAMES A. BRANCH
THOMAS B. BRANCH, JR.
Counsel for Respondents.

SUPREME COURT OF THE UNITED STATES

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W. E. CARROLL, CLARENCE H. CALHOUN, MRS. HATTIE PICKARD, MRS. EMMA B. MOORE, AND SAM PICKARD, Trustee for SAM PICKARD, JR.,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF OF RESPONDENTS IN REPLY TO THE BRIEF OF THE FEDERAL COMMUNICATIONS COMMISSION, AMICUS CURIAE.

After the preparation of the brief filed for respondents we were served with a brief of the Federal Communications Commission.

In the main, the questions discussed in the Commission's brief were dealt with in our original brief. How-

ever, there are a few matters in the Commission's brief which we desire to answer.

I.

On page 5 of the Commission's brief it is stated that the contract upon which the state court suit was predicated contained a provision that:

> "The first party (petitioner) agrees that it will in good faith undertake to have the Georgia School of Technology operate Station WGST in an efficient and satisfactory manner to the end that said Broadcasting Station may continue to earn and receive as large net billings as may be possible, having in view general business conditions and other factors which enter into and affect the results of such operations (R. 14)".

In Footnote 12, page 49 of the Commission's brief, it is said:

> "A claim that performance of the contract was not in any way dependent on the action of the Commission on petitioner's application for renewal would find no support in the record. The fact that the payments constituting performance were to come from the operation of the station (which could be lawfully operated only under a license granted by the Commission, Communications Act, Section 301, Appendix, *infra*, p. ___), is put beyond question by the provisions of paragraph 6 of the Contract of April 15, 1943 (R. 14)."

Counsel for the Commission have overlooked the fact that the provision to which they refer was stricken from the contract of April 15, 1943 and the Commission was

so informed by the Regents. We quote from the application of the Regents (R. 59, 60) as follows:

> "Paragraph 6 of the contract, effective April 15, 1943, reads as follows:
>
> > " 'The first party agrees that it will in good faith undertake to have the Georgia School of Technology (fol. 67) operate Station WGST in an efficient and satisfactory manner to the end that said Broadcasting Station may continue to earn and receive as large net billings as may be possible, having in view general business conditions and other factors which enter into and affect the results of such operations.'
>
> "The Propriety of this covenant, as applicant is informed, has been challenged on the ground that it tends to obligate licensee to operate said station in the interest of former stockholders of Southern Broadcasting Stations, Inc., rather than in the public interest, as required by law. Since the parties never presumed that such a construction would be placed on the contract and since they entertained no intent to that effect, the contract has been amended by striking this covenant therefrom, the contract in other particulars remaining as appears of record in this case. Copies of the amendment are herewith shown as Exhibit 'A' hereof."

The argument of the Commission to the effect that "the payments constituting performance were to come from the operation of the station" is conclusively answered, we think, by the decision of this court in *Nutt* v. *Knut*, 200 U. S. 12, discussed and quoted from in our main brief (pp. 10-12). In that case, although the contract specifically provided that the attorney employed

to prosecute the claim against the United States was to be paid "a sum equal to 33-1/3 per cent of the amount which may be allowed on said claim, the payment of which is hereby made a lien upon said claim and upon any draft, money, or evidence of indebtedness which may be issued thereon" (200 U. S. p. 13) this Court held that the state court's judgment awarding damages for the breach of the contract, the damages being assessed at "a sum equal to 33-1/3 per cent of the amount allowed on the claim", was to be "regarded as only giving effect to the agreement as to the basis upon which the attorney's compensation was to be calculated".

The Court of Appeals of Georgia, in the present case did no more than, and not differently from, what was done by the state court in *Nutt* v. *Knut*, *supra*.

II.

It is stated in the Commission's brief (p. 4):

> "Under this contract, there was no outright sale of the broadcasting facilities and equipment from Southern to petitioner. Nor was there any express settlement and liquidation of the claim of Southern to ownership of these facilities and equipment (R. 36, 68). Instead, under the contract, which was between petitioner and the respondents, 'all of the stockholders of Southern Broadcasting Station, Inc.' (R. 12), petitioner purchased from respondents all of the shares of stock owned by them in Southern, . . ."

And it is argued (p. 24) that the Commission "was authorized to impose a condition on the granting of any renewal of petitioner's license that petitioner as-

sume undivided control of the operation and management of the station and free itself entirely of the relationship which had been found to be illegal and contrary to the public interest." In reply we submit the following:

Under the contract of April 15, 1947, the entire ownership and control of Southern Broadcasting Stations, Inc. passed into the hands of the Regents. Obviously, whatever property, including the contract rights and everything else that belonged to Southern Broadcasting Stations, Inc. passed out of the control of respondents and under the absolute control of the Regents. The operating contract, to which reference is so often made in the brief of the Commission, passed under this sale into the hands and control of the Regents. There was no operating contract with respondents. The Commission itself found (R. 69) that "the influence and control of the interests identified with Southern Broadcasting Stations, Inc. appear to have been removed from the operations of Station WGST,". The Regents, after acquiring all of the stock of Southern, assumed control, elected a new board of directors, accepted the resignations of all of the former officers, elected its own official personnel and immediately took action to liquidate Southern and surrender its charter; and the liquidation was completed and the charter surrendered and accepted by the Superior Court, on July 9, 1943, after it was satisfactorily shown by the Regents to the court that the corporation's assets and liabilities had been "properly disposed of" and that the surrender of its charter would be without prejudice to the rights of any stockholder or creditor (R. 57). It seems to us that it would be hard to imagine any more effectual sale and settlement and liquidation of

the claim of Southern to the ownership of these facilities and equipment, and cancellation of the old operating contract, than was accomplished by virtue of the contract of April 15, 1945.

III.

It is argued throughout the brief of counsel for the Commission that the order of the Commission, conditionally denying a renewal of the license, was, in effect, to require that the obligations of the Regents under the contract of April 15, 1945, be repudiated by the Regents. We have shown in our original brief that such a construction would be contrary to repeated rulings of the Commission and would be directly contrary to the position which the Commission took in its brief filed in the *Churchill* case (Appendix A to original brief).

Moreover, we respectfully urge that even if it could be assumed that the Commission had the power and authority to make any such order as a condition to granting the license, the very most that could be said with respect to the condition that no further effect be given to the agreement would be that the payments required by the contract to be made should not be made out of the proceeds of the operation of the station. For certainly it would not be contended that the Commission would have authority to direct the Regents how funds at its command from other sources must be handled or disposed of. The Regents acquire and receive income from many sources. See: *Allen* v. *Regents of the University System of Georgia*, 304 U. S. 439, 450, 451 (relating to income from athletic contests); *Trustees of the University System of Georgia* vs. *Denmark*,

141 Ga. 390 (bequests); *Regents of the University System of Georgia* v. *Trust Company of Georgia*, 194 Ga. 255, 256, 257 (bequests); *Medical College of Georgia* v. *Rushin*, 1 Ga. App. 468 (operation of hospitals). The Regents (successor to Trustees of the University System) are liable under contract for the purchase of equipment, *First District Agricultural and Mechanical School* vs. *Reynolds*, 11 Ga. App. 650; also, on contracts with teachers, *Regents of the University System of Georgia* v. *Blanton*, 49 Ga. App. 602. The Regents are authorized to purchase land, construct dormitories, gymnasia and other buildings, and to require students to pay reasonable fees for their use; also to lease gymnasia to corporate athletic associations, *State of Georgia* v. *Regents of the University System of Georgia*, 179 Ga. 210.

It would hardly be thought that the Commission would assume, or that it would have authority, to order the Regents, as a condition to granting a renewal of license, to repudiate any of the many legal obligations which the Regents are authorized to and do assume in connection with the numerous activities over which they have control. And equally true, it is, that the Commission would hardly assume, or that it would have authority, to direct the Regents as to the disposition of funds from the many sources from which it derives income.

This Court has held that the Commission does not have jurisdiction over "business management" of licensees. *Federal Communications Commission* v. *Sanders Brothers*, 309 U. S. 470, 475. And the Commission itself has unequivocally taken the same position (Appendix A to main brief of respondents).

IV.

It is argued that the findings of the Commission, with respect to the contract of April 15, 1943, left only two alternatives, one for the renewal of the license to be denied, the other for the contract to be abandoned or repudiated by the Regents. We respectfully take issue with this. The Regents had the choice, and the means, to compensate for the property which had been sold to the Regents and this could have been done without using any funds derived from the operation of Station WGST. Counsel for the Commission state in their brief (p. 39):

> "The decision of the Commission does not destroy the private rights of respondents, so far as respondents have an interest in what they have parted with under the contract. For the cases make it clear that while federal action may render a contract impossible of performance (*L. & N. R. R. Co.* v. *Mottley*, 219 U. S. 467), that does not foreclose the party who is unable to obtain performance from securing a reasonable value of what he has parted with if such equitable remedy is available under state law."

Georgia Code of 1933, § *37-807*, provides:

> "If, for any cause, the specific performance shall be impossible, or the vendee shall decline to accept a performance in part, the court may proceed to assess damages for the breach of the contract."

Woodall v. *Williams*, 176 Ga. 343, 347.

The question as to the correct measure of recovery was purely a state question as pointed out in our original brief (pp. 14-18).

In the brief of the Commission (pp. 28, 29), *Federal Radio Commission* v. *Nelson Bros.*, 289 U. S. 366; *Networks* cases, *Columbia Broadcasting System* v. *United States*, 316 U. S. 407; *National Broadcasting Co.* v. *United States*, 319 U. S. 190, are cited and relied upon as authority to the proposition that the Commission has the power to "affect an alteration of private rights when a denial of that consequence would frustrate Commission action which it is authorized to take" (p. 26).

We do not contend, and have never contended, that contracts can limit or "frustrate" Commission action which is taken within the authority conferred upon the Commission by the Act. The state court has not ruled anything contrary to this. The *Networks* cases and the *Nelson Brothers* case are not authority, however, for the proposition that the Commission can alter private rights under a contract when that contract does not deal or purport to deal with any matter over which the Commission has authority to take action. Those cases related to contracts directly affecting broadcasting. *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 131, 132, is, we think, conclusive that the Commission does not have such authority over private rights concerning radio equipment.

V.

Repeated reference is made to *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350. It is cited repeatedly as authority for the proposition that contract rights may be affected by Commission action. In our original brief, we pointed out that this Court very definitely decided in that case that the private rights of parties under the contracts there under con-

sideration were not, and could not be, affected by the action of the Labor Board; that the extent to which the order of the Labor Board in holding those contracts contrary to the National Labor Relations Act could affect them was to prevent specific performance thereof, but that no rights of the employees under the contracts would in any wise be affected.

VI.

Counsel for the Commission argue that the case should be remanded to the state court for consideration of the defense of the impossibility of performance. In reply to this we submit that the state court has definitely passed upon this defense. On page 48 of their brief, they say:

> ". . . Had the state court accepted the Commission's decision as being within that body's licensing authority but, nevertheless irrelevant to a determination of private contract rights, the petitioner's case here would stand or fall on the arguments made in the earlier sections of this brief."

In reply to this, we submit that the state court definitely accepted the Commission's decision as being within that body's licensing authority. It seems to us that it would be hard to more clearly state than did the state court that the licensing power is vested solely in the Commission; that the Commission "has the power and authority to grant or refuse licenses to radio broadcasting stations, with a view to subserving the public interest."

We therefore submit that there is no reason whatever why the case should be remanded to the state court

to pass upon the defense which that court has already passed upon and decided against the Regents.

JAMES A. BRANCH,
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Counsel for Respondents.

801 Hurt Building,
Atlanta, Georgia.

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 83

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, PETITIONER

v.

W. E. CARROLL, CLARENCE H. CALHOUN, MRS. HATTIE J. PICKARD, ET AL.

MEMORANDUM OF THE FEDERAL COMMUNICATIONS COMMISSION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The facts of the case are adequately set forth in the petition for certiorari.

In short, the Federal Communications Commission found that a contract, whereby respondents were permitted to manage, and retain most of the proceeds from, the radio station for which a license had been granted to petitioner, was in violation of Section 310(b) of the Communications Act (47 U. S. C. § 310(b)) [1] and not in the public interest, and refused to renew petitioner's license if the con-

[1] The statutory provisions are printed in the Appendix to the Petition for Certiorari.

tract was not discontinued. The petitioner thereupon, on April 15, 1943, entered into a second contract whereby the first was abrogated, but under which respondents were to receive 15% of the radio station's gross receipts, including receipts from new services such as FM or television, until January 6, 1950. After a hearing, of which respondents had actual notice, the Commission held that the granting of the application for renewal of license with the licensee subject to the provisions of the contract of April 15, 1943 would not be in the public interest on three grounds: (1) the provisions for payment, based upon a substantial percentage of gross receipts, might jeopardize the licensee's financial ability to conduct future operation of the station in the public interest; (2) the provision for sharing in the receipts from new services such as FM and TV operated as a deterrent to development of such services by the licensee; and (3) the new contract in fact was a means of giving further effect to the previous arrangement found by the Commission to be unlawful. (R. 64-71) This proposed denial was, however not unqualified. For, the Commission further proposed that (R. 71):

> The application, therefore, should be denied, without prejudice, however, to the submission within ninety days by the Georgia School of Technology of a new application for a construction permit and license to operate on the same frequency, provided it is affirmatively shown that no further effect is given

to the agreements between the Georgia School of Technology and Southern Broadcasting Stations, Inc., which the Commission has found in Docket 5903 and in this proceeding to be contrary to the Communications Act and incompatible with the operation of the station in the public interest.

Thereafter, on October 11, 1945, the petitioners passed a resolution to the effect that the contract would no longer be complied with, but that this action was to be without prejudice to a fair adjustment or settlement of whatever rights respondents may have, subject to the approval or consent of the Federal Communications Commission. (R. 72.) The Commission then granted the application for renewal of the license.

Respondents' predecessor participated in the first proceeding before the Commission but did not seek review of the Commission's decision in the courts. Respondents had actual notice and knowledge of the second proceeding, but failed to intervene. Respondents also received adequate notice of petitioner's intention not to contest the Commission's decision prior to such time as respondents could have petitioned for rehearing before the Commission or could have taken an appeal as a "person aggrieved" by the Commission's decision, under Section 402(b)(2) of the Communications Act. Cf. *Churchill Tabernacle* v. *Federal Communications Commission*, 160 F. 2d 244 (C. A. D. C.).

Respondents then sued petitioner for breach of contract in the State court, and were awarded the precise amount which they would have received under the contract of April 15, 1943. The Federal Communications Commission appeared as *amicus curiae* in support of the petitioner in the State trial and appellate courts. The Georgia court held that the Commission had no authority to regulate private contract rights, and indeed, that it could not constitutionally be granted any such authority (R. 137-138).

The decision below compelled the petitioning radio licensee to pay the exact amount which it was obligated to pay under the contract which the Federal Communications Commission found to be contrary to the public interest. The decision thus nullifies the action of the Commission in refusing to grant a radio license to petitioner except on condition that the contract be terminated. To permit a State court so to disregard or override the orders of a federal agency would frustrate the operation of the federal statute, and violate the basic teaching of the Supremacy Clause.

In particular is this so when the federal statute prescribes the manner in which administrative decisions are to be reviewed in the courts—in this situation in the Court of Appeals for the District of Columbia Circuit, and on writ of certiorari in this Court. Since this means of challenging the Commission's orders was available to respondents, they should not be allowed to circumvent the statu-

tory procedure by attacking the Commission's decision collaterally in the state courts.[2] Even an erroneous Commission decision would not be subject to such a collateral attack.

The court below was of the view that the Commission lacked jurisdiction over the subject because private contract rights were involved. But the Commission unquestionably has the authority to determine whether the provisions of a contract between a licensee and a third party prevent an applicant for a license from meeting the statutory test of "public convenience, interest or necessity." Cf. *National Broadcasting Co.* v. *United States*, 319 U. S. 190. In this case it appears that the Commission was concerned with the contract of April 15, 1943 exclusively from the point of view of the public interest in the field of radio broadcasting, as it bears on arrangements entered into by applicants which may adversely affect their ability to operate in the public interest, and which are inconsistent with the Communications Act. The features of the contract passed upon by the Commission were not its validity under requirements of the law of contracts, or any other body of law exclusively concerned with the private rights and duties of the parties, but rather its effect upon the future

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[2] *Venner* v. *Michigan Central Railroad Co.*, 271 U.S. 127; *Atchison, T. & S. F. Ry. Co.* v. *Scarlett*, 300 U.S. 471; *Hagens* v. *United Fruit Co.*, 135 F. 2d 842 (C.A. 2); *Ingram* v. *Union Stock Yards Co.*, 64 F. 2d 390 (C.A. 8); *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784, 789 (C.A. 6).

operation of the station from the standpoint of the public interest with respect to its financial ability to continue adequate operation, its effect in imposing restraints on expansion of the station into new fields of broadcasting, and its effect on the public interest in the enforcement of Section 310(b) of the Communications Act. It is well established that private contracts cannot thwart the exercise of the regulatory powers of Congress. *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, 282; *Louisville & N. R. R. Co.* v. *Mottley*, 219 U. S. 467; *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 306-311.

Since the Commission here had expressly made findings with respect to the lack of public interest in the contract involved, this case presents a more direct interference with the federal statutory scheme than did *Radio Station WOW* v. *Johnson*, 326 U. S. 120, where the Commission had itself made no findings as to the issue of fraud presented to the State courts for adjudication. The Court, nevertheless, held in that case that the Nebraska Court's decree would invade the area of jurisdiction reserved to the Commission under the Communications Act.

The issues presented by this case are of obvious importance to the successful working of the federal regulatory scheme. State courts should not be permitted to compel conduct which a federal agency has lawfully held to be contrary to the public interest—and that is the effect of the Georgia deci-

sion here. In the *WOW case* (326 U. S. at 123), this Court granted certiorari "because of the importance of the contention that the State court's decision had invaded the domain of the Federal Communications Commission." We believe that the same considerations even more strongly require the issuance of the writ in this case.

Respectfully submitted,

PHILIP B. PERLMAN,
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BENEDICT P. COTTONE,
General Counsel,
Federal Communications Commission.

OCTOBER, 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 697973 219

INDEX.

Page

Statement 1
Summary of Argument 14

Argument:

I. The courts below improperly denied to the Commission's decision, made in the exercise of authority conferred by the Communications Act, the effect required by that Act and by the Supremacy Clause 20

A. The Commission acted within its authority in considering the contractual relations between petitioner and respondents and conditioning renewal of license on their abandonment 21

B. Commission decisions can effect an alteration of private rights when a denial of that consequence would frustrate Commission action which it is authorized to take 26

C. The judgments of the state courts here frustrate the Commission's decisions in the licensing proceedings; for that reason, the state court judgments must give way .. 31

II. The findings of the Commission on the contract of April 15, 1943, made with respect to a subject matter involved in the exercise of licensing functions under the Communications Act, are reviewable only in the manner prescribed by the Communications Act and are not open to collateral attack in either federal or state courts 40

III. The petitioner is, at the least, entitled to a state court consideration of its defense to the contract action in which the starting point would be the Commission's findings 47

Conclusion 50
Appendix 51

CITATIONS.

CASES:

Ashbacker Radio Co. v. *Federal Communications Commission*, 326 U. S. 327 23
Atchison, Topeka and Santa Fe Ry. v. *Scarlett*, 300 U. S. 471 41
Berg v. *Cincinnati, Newport and Covington Railway Co.*, 56 F. Supp. 842 42
Columbia Broadcasting System v. *United States*, 316 U. S. 407 .. 29
Churchill Tabernacle v. *Federal Communications Commission*, 160 F. 2d 244 ..... 25, 26, 40, 46
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134 39

Page

Federal Communications Commission v. *Sanders Radio Station*, 309 U. S. 470 23
Federal Communications Commission v. *WJR, The Goodwill Station*, 337 U. S. 265 23
Federal Land Bank v. *Shingler*, 174 Ga. 352 48
Federal Radio Commission v. *Nelson Brothers Co.*, 289 U. S. 266 ..... 15, 28
Hagens v. *United States Fruit Co.*, 135 F. 2d 842 41
Harris v. *Central Nebraska Public Power and Irrigation District*, 29 F. Supp. 425 42
Ingram v. *Union Stockyards Co.*, 64 F. 2d 390 41
L. & N. R. R. Co. v. *Mottley*, 219 U. S. 467 ..... 15, 27, 39
Malvern v. *Chicago, R. I. & P. Ry. Co.*, 182 Fed. 685 ..... 27, 42
Michigan Consolidated Gas Co. v. *Panhandle Eastern Pipeline Co.*, 173 F. 2d 784 42
Monocacy Broadcasting Co. v. *Prall*, 90 F. 2d 421 41
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 41
National Broadcasting Company v. *United States*, 319 U. S. 190 29
National Licorice Co. v. *National Labor Relations Board*, 309 U. S. 350 ..... 15, 28, 29, 31, 39, 44, 49
New York Central & H. R. R. R. Co. v. *Gray*, 239 U. S. 583 39
Radio Station WOW v. *Johnson*, 326 U. S. 120 ..... 30, 39
Red River Broadcasting Co. v. *Federal Communications Commission*, 98 F. 2d 282, *certiorari denied*, 305 U. S. 625 43
Ryan v. *KVL*, 198 Wash. 459, 88 P. 2d 836 ..... 32, 39
Jacob Siegel Co. v. *Federal Trade Commission*, 327 U. S. 608 38
State Tax Comm'n v. *Van Cott*, 306 U. S. 511 50
Sykes v. *Jenny Wren Co.*, 72 F. 2d 729, *certiorari denied*, 296 U. S. 624 41
Union Dry Goods Co. v. *Georgia Public Service Corporation*, 145 Ga. 658, affirmed, 248 U. S. 372 48
Venner v. *Michigan Central Railroad Co.*, 271 U. S. 127 41
Watson Brothers v. *Jaffa Co.*, 143 F. 2d 340 27

STATUTES:

Constitution of the United States
Article VI 16, 51

Communications Act of 1934, as amended, 47 U. S. C., Sec. 151 et seq:
Sec. 1 ..... 23, 51
Sec. 4 (i) 52
(j) 52
Sec. 301 ..... 14, 22, 23, 49, 53
Sec. 303 (r) 23, 54
Sec. 304 ..... 23, 54
Sec. 307 (a) 14, 22, 55
(d) 14, 22, 23, 55
Sec. 308 ..... 14, 22, 56

Page

Sec. 309 (a) 22, 43, 57
(b) 23, 57
Sec. 310 (b) 14, 16, 21, 23, 24, 31, 32, 34, 37, 47, 58
Sec. 312 (a) 59
Sec. 402 (a) 60
Sec. 402 (b) 17, 40, 43, 45, 60
Sec. 405 ..... 43, 45, 61

Rules and Regulations of the Federal Communications Commission
Sec. 1.102 ..... 18, 43, 45, 62

Miscellaneous:
American Law Institute, *Restatement of Contracts*, Sec. 458 48

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 83

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
Petitioner

v.

W. E. CARROLL, CLARENCE H. CALHOUN, MRS. HATTIE J. PICKARD, ET AL.

On Writ of Certiorari to the Court of Appeals of Georgia

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION, *AMICUS CURIAE*.

STATEMENT

Petitioner is the licensee of Radio Station WGST and holds that station as a trust for and on behalf of the Georgia School of Technology (hereinafter referred to as "the School"), which acquired the station as an endowment in 1923 (R. 35). On January 6, 1930, petitioner entered into a management contract with Southern Broadcasting Stations, Inc. (hereinafter referred to as "Southern") former stockholders of which are the respondents here, under which Southern was to operate

the station for the School for a period of ten years (R. 35). Under the terms of that contract, Southern was to receive all the gross receipts of the station except a specified percentage, beginning with 5% and increasing from year to year to a maximum of 10% in 1934 and the years thereafter, which was paid to the School (R. 35-36). This contract, which was to expire in 1940, was superseded by one dated June 18, 1936, which extended the management of the station by Southern until January 6, 1950 (R. 38, 68-69).

An application for renewal of license was filed by the School on January 31, 1940. On August 28, 1940, the Commission set the application down for hearing on issues relating to the question whether the School had improperly surrendered and transferred control of the license issued to it. (R. 33-34). Following renewal proceedings, including hearing and oral argument, in Docket Number 5903 before the Commission in 1943, in which Southern had intervened and participated (R. 33), the Commission, in a Proposed Decision, adopted March 23, 1943, held that it would not renew the license of Station WGST so long as the management contract between Southern and petitioner was adhered to. This ruling resulted from the Commission's finding that the management contract constituted an improper transfer of the responsibilities of the licensee contrary to the public interest and in contravention of Section 310 of the Communications Act (R. 33-45). Because "no useful purpose

would be served by refusing to renew the license under any and all conditions" and "a continuation of the program service of Station WGST under proper management will serve the public interest, convenience and necessity" (R. 45), the licensee was given an opportunity to secure renewal of license on a showing of its plans for the acquisition of the necessary facilities and equipment, and for the business management, representation, and control of the station's future operations (R. 45).

No exceptions to that decision were taken by the petitioner or by Southern, the predecessor in interest of respondents, and by an order dated May 8, 1943, the Commission made the proposed decision final (R. 46). No appeal was taken from this final order by the petitioner or Southern. Instead, the parties had meanwhile entered into a new contract, dated April 15, 1943, which was submitted by the petitioner to the Commission with the application for renewal, dated May 20, 1943 (R. 51), as the petitioner's plan for acquiring the necessary facilities and equipment and the business management, representation and control of the future operation of the radio station (R. 91), in compliance with the condition set out in the Commission's proposed decision and final order.[1]

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[1] The Commission's final order of May 8, 1943, provided, in language substantially identical with that of the proposed decision (R. 45) that:

> the above-entitled application of Georgia School of Technology Be, and it is hereby, denied without prejudice

Under this contract, there was no outright sale of the broadcasting facilities and equipment from Southern to petitioner. Nor was there any express settlement and liquidation of the claim of Southern to ownership of these facilities and equipment (R. 38, 68). Instead, under the contract, which was between petitioner and the respondents, "all of the Stockholders of Southern Broadcasting Station, Inc." (R. 12), petitioner purchased from respondents all of the shares of stock owned by them in Southern, for which it agreed to pay

> as the full purchase price of said shares of stock, a sum equal to fifteen (15%) per cent of the net billings of Radio Station WGST, located in Fulton County, Georgia, from the sale of time on the air for any and all types of broadcasting, visual or sound, including any and all revenues which may be derived from such sources as a result of any new developments in the broadcasting field during the period in which the payments hereunder are to be made by the first party to the second parties hereto [R. 12-13].

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to the filing of a further application for renewal of license in accordance with the conclusions reached in these proceedings, such further application to be filed within 60 days from March 23, 1943, and to set forth the plan of the applicant for the acquisition of the necessary facilities and equipment, and for the business management, representation, and control of its future operations, together with a list of all persons to participate therein [R. 46].

The contract also contained a provision that

> The first party [petitioner] agrees that it will in good faith undertake to have the Georgia School of Technology operate Station WGST in an efficient and satisfactory manner to the end that said Broadcasting Station may continue to earn and receive as large net billings as may be possible, having in view general business conditions and other factors which enter into and effect the results of such operations [R. 14].

After examination of the further application for renewal of license and the contract of April 15, 1943, the Commission, in conformity with the provisions of Section 309(a) of the Communications Act of 1934, set the application down for hearing in Docket 6534 on issues relating to the contract of April 15, 1943 (R. 53-55).[2]

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[2] The notice of hearing issued by the Commission on October 12, 1943, a copy of which was sent to counsel for Southern (R. 55), specified the following issues, among others (R. 53, 54):

1. To determine whether the terms, provisions and conditions of the Commission's Proposed Findings of Fact and Conclusions of March 23, 1943, and Order of May 8, 1943, in Docket 5903 are effectuated by the provisions and consummation of the contract entered into between The Regents of the University System of Georgia, on behalf of the licensee, Georgia School of Technology, and the Southern Broadcasting Stations, Inc. of April 15, 1943.

2. To determine the extent to which the former officers, directors, stockholders and employees of Southern Broad-

After the hearing, of which respondents had actual notice, the Commission held that the granting of the application for renewal of license with the licensee subject to the provisions of the contract of April 15, 1943, woud not be in the public interest on three grounds: (1) the provisions for payment, based upon a substantial percentage of gross receipts, might jeopardize the licensee's financial ability to conduct future operation of the station in the public interest; (2) the provision for sharing in the receipts from new services such as FM and TV operated as a deterrent to development of such services by the licensee; and (3) the new contract was in fact a means of giving further effect to the previous arrangement found by the Commission to be unlawful, and "A grant of the renewal application under circumstances where a party to an arrangement found by the Commission to be in

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casting Stations, Inc., will participate in the revenues of the station under the contract of April 15, 1943, as heretofore described, and the effect which this participation will have on the overall finances and operation of the station.

• • • • •

8. To determine whether in the light of the Commission's Proposed Findings of Fact and Conclusions and Order in Docket 5903 and the present and future relationship between the Regents of the University System of Georgia, the WGST Radio Committee, the licensee, Georgia School of Technology, and the Southern Broadcasting Stations, Inc., their present and past officers, directors, stockholders and employees, the granting of this application and the continued operations of WGST will serve public interest, convenience and necessity.

contravention of law would continue to profit from such arrangement would not be in the public interest since it would, in effect, condone such illegality and thwart the Commission's efforts to enforce the requirements of the Act." (R. 69-71).

These conclusions were based upon the following findings: (1) the payments under the contract, totalling approximately $366,000, "would be made to the former stockholders of Southern Broadcasting Stations, Inc. in return for considerations which are at best of questionable value to the station". The assets of the corporation consisted of contracts entered into by the corporation on the basis of former relationships with the station which the Commission found, in Docket 5903, to be in contravention of law, and without such relationships these contracts would appear to be valueless. Moreover, the estimated value of the station equipment was found to be approximately $50,000, and the ownership of that equipment was in question; (2) the payments under the contract were to be made until January 6, 1950, the same date as the termination date of the 1936 agreement; (3) the testimony given in behalf of the Regents showed that the value of the assets of Southern was not taken into consideration in arriving at the amount to be paid for the stock of the corporation. That testimony showed, instead, that the members of the committee of the Regents, entrusted with the negotiations, desired to retain the goodwill of the former stockholders of Southern so

that they would cooperate in maintaining WGST's past associations and would not transfer their interests, such as the network contract to other stations, although the Regent's Committee insisted on no such binding engagement from the stockholders. The evidence showed also that the committee of the Regents had agreed to the large payments because of their desire to reward the former stockholders for the commercial success they had made of operating the station. (R. 67-71.)

The proposed denial of renewal based on these findings and conclusions was, however, not unqualified. For, the Commission further proposed that (R. 71):

> The application, therefore, should be denied, without prejudice, however, to the submission within ninety days by the Georgia School of Technology of a new application for a construction permit and license to operate on the same frequency, provided it is affirmatively shown that no further effect is given to the agreements between the Georgia School of Technology and Southern Broadcasting Stations, Inc., which the Commission has found in Docket 5903 and in this proceeding to be contrary to the Communications Act and incompatible with the operation of the station in the public interest.

The respondents, parties to the contract, had actual notice and knowledge of the proceedings before the Commission in Docket Number 6534 on

the further application for renewal involving the contract of April 15, 1945 (R. 94-95), but they did not intervene in those proceedings. The respondents also received adequate notice of petitioner's intention not to contest the Commission's decision on October 2, 1945, which was prior to the issuance of the order of November 9, 1945, making final the proposed decision of September 19, 1945 (R. 98-106).

Thereafter, on October 11, 1945, the petitioners passed a resolution to the effect that the contract would no longer be complied with, but that this action was to be without prejudice to a fair adjustment or settlement of whatever rights respondents might have, subject to the approval or consent of the Federal Communications Commission. On November 9, 1945, the proposed findings of fact and conclusions of the Commission were made final (R. 72). On December 4, 1945, petitioner filed an application for renewal of license, and, in accordance with the proviso in the Commission's decision, filed with that application a statement setting out its action of October 11, 1945 (R. 74-78). Thereafter, on March 7, 1946, the Commission granted the application for renewal (R. 81).

On June 18, 1947, respondents, the former stockholders of Southern and parties to the contract of April 15, 1943, brought suit in the Superior Court of Fulton County, Georgia to recover the amounts alleged to be due from petitioner under the contract of April 15, 1943, from August 1945 (R. 9-

11). In its answer, petitioner admitted the making of the contract and its terms and also the failure to make payments pursuant to the contract after July 1945 (R. 17-18). Petitioner also set out fully in its answer the proceedings before the Commission on its applications for renewal of license, in which the Commission passed on the contract of June 18, 1936, with Southern, and the contract of April 15, 1943, with respondents, and the decision of September 19, 1945, made final by the order of November 9, 1945. It based on this decision a defense of impossibility of performance resulting from the decision of a federal agency acting in the exercise of its statutory authority. (R. 19-23.)

By agreement of the parties, the case was submitted to the trial court, sitting without a jury, upon an agreed statement of facts, stipulations of the parties, and documentary testimony, admitted without objection (R. 89). The record before the court included the Commission's findings and conclusions and final order in Docket 5903 and the order of hearing, findings and conclusions and final order in Docket 6534 (R. 90-93). And it was stipulated on the record that respondents had actual knowledge that petitioner, in making its second application for renewal of license, had submitted the contract of April 15, 1943, to the Commission; that respondents had actual notice of the Commission's order of October 12, 1943, setting the application down for hearing in proceedings entitled Docket

Number 6534; that respondents had actual knowledge of the holding of the hearing; and had actual knowledge of the issuance of the Commission's proposed decision of September 19, 1945, and final order of November 9, 1945, denying petitioner's application for renewal of license with the proviso that petitioner could reapply for renewal of license upon a showing that no further effect was being given to the agreements between petitioner and Southern which were found to be contrary to the Communications Act and incompatible with the operation of the station in the public interest (R. 94-95).

The trial court rejected the petitioner's defense of impossibility and rendered judgment for principal due under the contract in the amount of $144,968.63, which was 15% of the net billings of Radio Station WGST from July 1945 until August 1947, plus interest in the amount of $10,997.31 (R. 123)[3]

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[3] The following findings of fact and law of the trial court deal with the Commission's proposed decision of September 19, 1945, and final order of November 9, 1945 (R. 109-110):

3. The plaintiffs were not parties to the proceedings before the Federal Communications Commission entitled "In the matter of the application of Georgia School of Technology (WGST), Atlanta, Georgia. For renewal of license. Docket Number 6534."

4. The Federal Communications Commission was without jurisdiction to nullify, change or anywise modify the duties and obligations of the parties to the contract of April 15, 1943.

5. That portion of the order of the Federal Communications Commission of November 9, 1945, to wit:

The petitioners thereupon took a direct appeal to the Supreme Court of Georgia, which remanded the appeal to the Court of Appeals of Georgia. (R. 124-126). That court affirmed the findings of fact and law and the judgment of the trial court in a decision which amplified the grounds of decision of the trial court with an explicit finding (R. 136) that:

> It does not appear that the subject matter of the contract was affected with such a public interest as to justify the same to be nullified by the order of a governmental agency, charged by act of Congress under the authority of the commerce clause of the Constitution with the power to license radio broadcast-

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"IT IS FURTHER ORDERED, Upon consideration of the entire record that the application of Georgia School of Technology for renewal of the license of Station WGST, BE, AND IT IS HEREBY, DENIED without prejudice, however, to the submission before December 18, 1945, by the Georgia School of Technology, of a new application for a construction permit and license to operate on the same frequency, provided it is affirmatively shown that no further effect is given to the agreements between the Georgia School of Technology and Southern Broadcasting Stations, Inc., which the Commission has found in Docket 5903 and in this proceeding to be contrary to the Communications Act and incompatible with the operation of the station in the public interest."

does not constitute a valid defense or bar as a matter of fact or law to the right of the plaintiffs to enforce the provisions of the contract of April 15, 1943, on the ground that said order has rendered performance on the part of the defendant Board of Regents impossible.

ing stations and to regulate their interstate transactions * * *.[4]

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[4] The following excerpts from the decision of the Court of Appeals are also pertinent to this finding:

* * * but nothing in the power granted to the commission or in said communications act of Congress gives to the commission the power and authority to regulate the private contracts and business of those operating radio broadcasting stations, where same is not necessary in the protection of the public interest, and where such contracts do not affect the interstate transactions of the radio station [R. 127].

It cannot be anticipated that the contract sued on, insofar as it related to the payment of the agreed purchase price of this stock and of the assets of the corporation, giving to the regents complete control of the radio station and its operation, would so far affect the financial ability of the radio station as to render the station unable to operate in the public interest. The evidence fails to show that the contract would affect the public interest in reference to the broadcasts of this station. [R. 137.]

* * * it not appearing that the payment of such purchase price would render the radio station unable to operate in the public interest * * * [R. 137].

Judge Almand [the trial judge] denied the contentions of the defendant as to the legal impossibility of performing the contract sued on by reason of an act of law, and that the Regents were therefore excused from performance; and ruled that the Federal Communications Commission was without power to take any action which would have the effect of nullifying, changing, or in any wise modifying the duties and obligations of the parties to said contract thereunder * * * [R. 130].

Taking the above view, the other contentions of the regents are necessarily to be determined adversely to the regents and are controlled thereby, and the trial judge's ruling and judgment excepted to were not erroneous for any of the reasons assigned [R. 138].

Thereafter, petitioner filed a motion for rehearing in the Court of Appeals (R. 139-148). After the denial of that motion (R. 148-149), petitioner filed an application for a writ of certiorari in the Supreme Court of Georgia (R. 149), which was also denied (R. 150).

SUMMARY OF ARGUMENT

I.

The Commission's findings as to the contract of April 15, 1943 were made in proceedings on petitioner's application for renewal of license. These were the outgrowth of earlier renewal proceedings in which the Commission had held that a management contract relationship between petitioner and Southern was in violation of Section 310(b) of the Act, and that the grant of a renewal to petitioner while this relationship endured would be contrary to the public interest. The licensing provisions of the Communications Act (Sections 301, 307(a) and (d), and 308), as well as the provisions of Section 310(b), dealing with transfer of licenses, afford ample authority both for the Commission's previous findings as to the illegality of the management contract relationship, and the findings here involved, that the subsequent contract would adversely affect the ability of petitioner to operate its station in the public interest and would give effect to the previous arrangement found to be illegal under Section 310(b) of the Act.

Where the Commission considers and passes upon contractual relationships because of their relevance to a determination as to the public interest in licensing proceedings, its ruling can have the consequence of altering the contractual relationships passed upon, if such consequence is required to give effect to the Commission's determination. *L. & N. R. R. Co.* v. *Mottley,* 219 U. S. 467; *Federal Radio Commission* v. *Nelson Brothers Co.,* 289 U. S. 266, 282; *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350.

The contract of April 15, 1943, had its genesis in the Commission's action in holding that the prior management contract relationship between petitioner and Southern was illegal since it was in violation of Section 310(b) of the Act. The Commission found, with respect to the 1943 contract, that it imposed a financial burden of substantial periodic payments to the former stockholders of Southern for a period of the same duration as the remaining term of the illegal management contract; that this financial burden would adversely affect the ability of petitioner's station to operate in the public interest; and that since these payments permitted a party to an illegal arrangement to continue to profit from it, a grant of the renewal under these circumstances would thwart the Commission's effort to enforce the Act. The Commission also concluded that the continued operation and control of the station by petitioner itself in a man-

ner which did not give effect to the illegal relationship would be in the public interest.

The state court judgment here under review is in the face of these Commission determinations. It leaves the Commission with the alternative of turning its back on its judgment that the public interest and the policy of Section 310(b) cannot be served by operation of Station WGST pursuant to petitioner's contractual arrangement with respondents, or revoking or denying renewal of petitioner's license at the earliest opportunity. That a state court judgment should be permitted to compel the Commission to ignore the public interest and the policy of the statute is unthinkable. No less palatable woud be a situation in which a state court judgment were allowed to strait-jacket the Commission in such a manner as to force it to deny petitioner's license outright even though the Commission has found that petitioner's continued operation free of respondents' influence is in the public interest.

To state the alternatives open to the Commission in the light of the judgments below is to demonstrate the necessary conflict between those judgments and the Commission's lawful decision. In such a situation, the judgment of the state court must give way under the Supremacy Clause of Article VI. Enforcement against the petitioner of a contract which the Commission had found not to be in the public interest and the disavowal of which had been made a condition on the renewal of peti-

tioner's license is as unacceptable under the Supremacy Clause as would be a state court judgment enforcing a contract to which an employer had been directed not to "give effect" by the National Labor Relations Board. See *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 364-365.

II.

The courts below, in reexamining the findings of the Commission, and in substituting their own judgment as to the public interest for that reached by the Commission in the exercise of its licensing functions have not only frustrated the effectiveness of the Commission's action but have also denied effect to the Congressional scheme for review of Commission action. The Communications Act provides a remedy and method of appeal in the case of denial of an application for renewal of a radio station license (Section 402(b)). That remedy is available not only to the applicant but also to "any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application" (Section 402(b)(2)). Among the persons who may resort to the statutory review proceedings under this section is a party to a contract with a licensee whose application for renewal has been granted upon condition that the licensee terminate relationships found by the Commission to be contrary to the Communications Act and inconsistent

with the operation of the station in the public interest.

The remedy provided by the Act for review of the Commission decisions is exclusive, and actions of the Commission reviewable under these provisions may not be reviewed in the federal or state courts in any other manner.

Since the Commission's findings as to the contract of April 15, 1943, were made in the exercise of authority conferred on the Commission by the Communications Act, these findings were not open to collateral review by any court. Nor is any justification for such collateral review by the courts below afforded by the fact that respondents were not formally made parties to the proceedings in Docket 6534 by affirmative action of the Commission.

Under the statutory scheme of the Communications Act, which imposes no requirement that the Commission itself take action to join as parties in licensing proceedings, persons having contractual or other relationships with the licensee, the Commission has afforded interested persons an opportunity to intervene in such proceeding under the provisions of Section 1.102 of its Rules. In the earlier proceedings in Docket 5903, in which the management contract between Southern and petitioner was found to be illegal, Southern availed itself of this opportunity for intervention. It did not file exceptions or take an appeal from the Commission's decision that the management contract was illegal. The record shows that respondents

had actual knowledge of the proceedings before the Commission on the contract of April 15, 1943, but that they chose not to avail themselves of the opportunity to intervene with which they were acquainted. Nor did they intervene or take an appeal from the decision of the Commission after they received timely notice of it and of petitioner's disinclination to contest the decision further. Under these circumstances, where the Commission's processes afforded an adequate opportunity to respondents to assert their interests and where, with knowledge, they did not avail themselves of that opportunity, no due process issue is presented, and no justification for collateral attack can be based on the Commission's failure to take affirmative action to join respondents as parties to the proceedings involving the contract of April 15, 1943.

III.

Even if the view that the judgment of the court below is necessarily in conflict with what the Commission decided were not accepted here, a remand would be required. A remand would enable the court below to pass on petitioner's defense of impossibility of performance in the light of a direction from this Court that the Commission's findings are not open to reexamination, but must be accepted as given. For, the defense of impossibility of performance by reason of the act of an agency of government, federal or state, is part of Georgia's contract law. It is evident that since the

court below has not accepted the Commission's findings as given, but has reexamined them to reach a conclusion that they do not affect the public interest in a manner which would be pertinent to the contract action before the court, this consideration of the defense is permeated with the court's error in subjecting the Commission's findings to collateral review. Petitioner is at least entitled to a consideration of its defense in the courts below, freed from that error.

I

ARGUMENT

The Courts Below Improperly Denied to the Commission's Decision, Made in the Exercise of Authority Conferred by the Communications Act, the Effect Required by That Act and by the Supremacy Clause.

In the face of the express findings and conclusions of the Federal Communications Commission, that the contract of April 15, 1943, and antecedent arrangements are "contrary to the Communications Act and incompatible with the operation of the station in the public interest" (R. 71), the courts below have decided that the Commission was without authority to take action which would have the effect of changing the duties and obligations of the parties to the contract of April 15, 1943 (R. 109), and have explained that conclusion by holding also that the public interest was not involved in such manner as would justify Commission action which would have the effect of nullifying the con-

tract (R. 136-137). In so doing, they have committed error.

A. *The Commission acted within its authority in considering the contractual relations between petitioner and respondents and conditioning renewal of license on their abandonment.*—The contract of April 15, 1943, came before the Commission as a result of the proceedings in Docket 5903 on petitioner's application for renewal of the license for operation of Radio Station WGST. That contract was designed to liquidate the former arrangement between petitioner and Southern (R. 91), which the Commission had found to be in violation of the Communications Act, particularly Section 310(b), and which, consequently, presented an insuperable obstacle to the grant of petitioner's application for renewal while the relationship persisted. Southern actively participated as intervenor in the licensing proceedings in Docket 5903. But it did not, by taking exceptions or filing an appeal, challenge either the authority of the Commission to consider the earlier contractual relationships between petitioner and Southern or the correctness of the Commission's conclusions that these relationships were in violation of the Act and that continued operation of the station subject to them would be contrary to the public interest. Nor has any such direct challenge been made by respondents, either before the Commission or the courts, to the Commission's findings and conclusions in Docket 6534, with respect to the inadequacy of the contract of

April 15, 1943, as a corrective measure. The provisions of the Communications Act and the decisions interpreting that Act make it clear enough that, in any event, Southern or respondents could not, on a direct appeal of the Commission's decisions, have successfully challenged the authority of the Commission to consider contractual relationships between licensees and others in making determinations as to the public interest under the Communications Act.

Under the provisions of that Act, the Commission is authorized to issue radio station licenses and renewals of licenses to applicants upon a showing that the applicant possesses the requisite qualifications, including financial and technical qualifications, and that a grant of the application would serve the public convenience, interest, or necessity (Communications Act of 1934, Secs. 301, 307(a) and (d), 308, 47 U. S. C. 301, 307(a) and (d) 308). In the event that the Commission is unable to find, upon examination of an application for license or renewal of license, that the public interest would be served by granting it, it is required to notify the applicant and afford the applicant an opportunity to be heard. Section 309(a), 47 U. S. C. 309(a).

After the grant of a license or renewal, the licensee is not left free to deal with the license or the rights conferred by it as he sees fit. The Communications Act of 1934 and decisions of this court make it clear that the grant of a license does not

confer rights of property in the licensee. Sections 301, 304, 307(d), and 309(b), 47 U. S. C. 301, 304, 307(d), and 309(b); *Ashbacker Radio Co.* v. *Federal Communications Commission,* 326 U. S. 327, 331; *Federal Communications Commission* v. *Sanders Radio Station,* 309 U. S. 470, 475; *Federal Communications Commission* v. *WJR, The Goodwill Station,* 337 U. S. 265, 282. Furthermore, Section 310(b) of the Act (47 U. S. C. 310(b)) forbids the transfer or disposition in any manner of a station license or the rights conferred, unless the Commission shall, after securing full information, decide that the transfer is in the public interest, and shall give its consent in writing. In addition to the specific powers conferred in the Act, the Commission is given ancillary authority to make the exercise of the specific powers effective. Section 1 of the Act (47 U. S. 151), which declares the Congressional purpose in creating the Commission, provides that the Commission shall "execute and enforce the provisions of this Act." Section 303(r) of the Act [47 U. S. C. 303(r)] authorizes the Commission to "prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act."

The unglossed terms of the Act thus make it clear enough that the Commission was authorized to consider the management contract relationship between Southern and petitioner in licensing proceedings; that it was authorized to determine whether that relationship had been entered into

and continued in violation of Section 310(b) of the Act; that it was authorized to impose a condition to the granting of any renewal of petitioner's license that petitioner assume undivided control of the operation and management of the station and free itself entirely of the relationship which had been found to be illegal and contrary to the public interest; and that it was authorized to determine in further licensing proceedings whether petitioner had in fact so freed itself from the prior illegal relationship that the prior decision of the Commission was made fully effective and a finding could be made that the public interest would be served by a grant of petitioner's renewal application. The circumstances under which the Commission passed on the contract of April 15, 1943, can leave no doubt that the Commission made its determination in the exercise of authority conferred on it by Section 309(a) of the Communications Act, to examine the application to determine whether or not the public interest would be served by a grant; by Section 308(b), to pass on the financial qualifications of the applicant; and by Section 310(b), to insure that the prior illegal transfer of control of the station license in violation of that section be wholly undone before a renewal issues. The proposed decision of September 19, 1945 (R. 64-71), makes it equally clear that these sections of the Act afforded ample authority for the Commission to reach a conclusion, if found to be warranted by the

facts, that the contract of April 15, 1943, is contrary to the Communications Act and incompatible with the operation of the station in the public interest, and that, therefore, the application for renewal should be denied without prejudice to the filing of a new application, provided it is affirmatively shown that no further effect is given to that agreement and its predecessors. Cf. *Churchill Tabernacle* v. *Federal Communications Commission,* 160 F. 2d 244 (C. A. D. C.), in which the court upheld the authority of the Commission, in the exercise of its licensing functions, to declare certain features of a contract between a licensee and a third party contrary to the public interest.[5]

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[5] In relying on the *Churchill* case in its brief in opposition, respondent fails to recognize the limited nature of the grounds for partial reversal in that case and their inapplicability in the instant case, which is not the statutory proceeding for review of Commission findings and orders. In the *Churchill* case, the decision of the Commission was affirmed in part by the statutory court designated by Congress to review Commission action, and remanded in part by it for further proceedings. The remand was based on the Court's conclusion (1) that the order in effect required the abrogation of the contract in its entirety, although findings had not been made that all features of the contract were contrary to the public interest, and (2) that the Commission had failed to consider, in the light of the peculiar equities of the situation, whether a contract providing for reservation of some broadcast time for the church, over a limited period of years and modified in certain respects, would be contrary to the public interest. The equities which the Court found to exist were that the contract had been filed with the Commission's predecessor, and it had approved the transfer of control of the station which was in part the consideration for the rights acquired

B. *Commission decisions can effect an alteration of private rights when a denial of that consequence would frustrate Commission action which it is authorized to take.*—The indisputable authority of the Commission to consider contractual relationships relevant to a determination as to the public interest in licensing proceedings is not merely a power to indulge in impotent and fruitless utterances; it is an effective authority to make findings as to the public interest, so far as it derives from the Communications Act, which can have the consequences of altering the relationships passed upon, if such consequence is required to give effect to the Commission's determination. The consistent holdings of this Court leave no room at this date for assertion of the general proposition, sug-

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by Churchill under the contract, and that Churchill could not be restored to its former *status quo* as the licensee of the station by resort to equitable or legal remedies. In the instant case, the Commission has made findings as to the public interest with respect to all substantial features of the contract. And no equities were involved since the former relationship between the licensee and Southern was in clear violation of the Act, and had never been acquiesced in by formal action of the Commission.

Since Part III of the Commission's brief in the *Churchill* case, quoted in full as an appendix to the respondent's brief in opposition, was primarily addressed to the proposition that the Commission's order was not intended to have any effect on those portions of the contract relating to certain cash pay[illegible] and provisions for reverter of physical properties as to which the Commission made no findings, it obviously cannot be transposed to a situation where the Commission did make findings as to the public interest in all essential features of the contract in issue.

gested in the trial court's findings and authorities, that the determination of a federal agency exercising authority delegated by Congress under its commerce power cannot have the effect of changing the duties and obligations of parties to a contract which is involved in such a determination.[6] For an Act of Congress can itself have that effect. *L. & N. R. R. Co.* v. *Mottley*, 219 U. S. 467. And

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[6] The trial court below expressly found that "The Federal Communications Commission was without jurisdiction to nullify, change or anywise modify the duties and obligations of the parties to the contract of April 15, 1943" (R. 109). The trial court appeared to have reached this conclusion on two separate grounds. The first is that neither Southern nor respondents were joined as parties in the proceedings before the Commission involving the contract of April 15, 1943. This ground is reflected in the court's findings that respondents were not parties to the proceedings in Docket 6534 (R. 109), and its reliance on the case of *Malvern* v. *Chicago, R. I. & P. Ry. Co.*, 182 Fed. 685) (C. C. E. D. Ark.) (R. 110). The discussion in Point II, *infra*, pp. 42-47, covers this aspect of the decision of the court below. The second, and broader ground is that, in any event, the Commission did not have authority to take action which would affect the power of the court to give full effect to the agreement of the parties in an action based on the contract. The trial court's misconceived reliance on the case of *Watson Brothers Co.* v. *Jaffa*, 143 F. 2d 340 (C. A. 8) (R. 110), as well as its unelaborated Finding number 4 (R. 109), *supra*, note 3, p. 11, indicates such a sweeping and unqualified ground of decision. The *Watson* case affords no support whatsoever for such a view, since in that case the I.C.C.'s approval of the lease conditioned on submission of further data obviously created no obstacle to specific performance of the contract to execute the lease, and judicial action requiring a party to the contract to submit the requisite data to the I.C.C. would entail no frustration of the I.C.C. decision.

this Court has also explicitly recognized that agency action in exercise of authority delegated by Congress may have the same effect. *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, 282. In that case, which involved exercise of the licensing authority of the predecessor of this Commission, it was pointed out that (289 U. S. at 282):

> This Court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their enterprises.

An extremely close parallel to the situation at bar was that involved in *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350. The Board had there directed the employer not to give effect to contracts with its employees which the Board had found to be in violation of the Act. With reference to the effect to be given a federal administrative determination that a contract is in violation of, and contrary to the public policy embodied in the federal statute under which the contract came before the agency for examination, this Court observed (309 U. S. at 365):

> It will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it.

This recognition that federal administrative orders must bind other tribunals in the adjudication of otherwise private rights when that is necessary in order to accord those orders the effect contemplated by Congress is implicit in the decisions of this Court in the radio field. *Networks* cases, *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, and *National Broadcasting Company* v. *United States*, 319 U. S. 190. In the first *Networks* case, it was held that the network regulations constituted an order having immediate impact which was reviewable in the statutory review proceeding under Section 402(a) of the Act at the suit of the network organizations. This conclusion was reached on the showing of the networks that they were being threatened with destruction of their network organizations because their affiliated licensees were abrogating existing contracts containing provisions inconsistent with the network regulations. In the second *Networks* case, it was held that the Commission's network regulations represented a valid exercise of the Commission's authority under the Communications Act. In this closely contested litigation, the authority of the Commission to take action otherwise within its statutory authority which would have the practical effect of terminating existing contractual arrange-

ments between licensees and third parties was not in any way challenged on the ground that this resulted in a deprivation of property without due process of law in violation of the Fifth Amendment.

Radio Station WOW v. *Johnson*, 326 U. S. 120, certainly holds nothing inconsistent with the principle of federal supremacy explicitly and implicitly recognized in the above-cited cases. For that case simply acknowledges the authority of state courts to pass on private law aspects of contracts between licensees and others when the exercise of that authority does not conflict with the provisions of the Communications Act or with Commission action taken under that Act. In the *WOW* case, the issue of constructive fraud in connection with the adequacy of the consideration accepted by the transferor insurance company for the transfer of its radio station facilities, had not been raised before the Commission. Nor was it the subject of any findings by the Commission with respect to the operation of the station in the public interest by the transferee or the character qualifications of the transferee. Moreover, this Court was careful to protect the area of jurisdiction of the Commission under the Communications Act by holding that the state court was required to frame its decree with respect to the matters it was found to be authorized to adjudicate, in such a manner as not to invade that area.

C. The judgments of the state courts here frustrate the Commission's decisions in the licensing proceedings; for that reason, the state court judgments must give way.—An analysis of the Commission's decisions in this case and of the circumstances under which the petitioner was finally awarded a renewal of license makes it evident that the judgments below operate as a frustration of the Congressional grant of power to the Communications Commission. That frustration is as unacceptable under the Supremacy Clause of Article Six as would be a state court judgment enforcing a contract to which an employer had been directed not to "give effect" by the National Labor Relations Board. See *National Licorice Co.* v. *National Labor Relations Board.*, 309 U.S. 350, 364-365. For, as we shall show, the judgments of the courts below require the petitioner to do what the Commission has found should not be done, and frustrate the Commission's efforts to enforce effectively the provisions of Section 310(b) of the Communications Act.

Of vital significance for a proper appraisal of the Commission's findings and conclusions relating to the contract of April 15, 1943, are the circumstances under which that contract was entered into by petitioner and respondents and passed on by the Commission in connection with petitioner's further application for renewal of license. The background, indeed the genesis, of that contract was the Commission's previous decision in Docket

5903, holding that the management contract between respondent and petitioner was an unlawful delegation of petitioner's authority as a licensee to Southern and a transfer of the rights conferred by the license to Southern without consent of the Commission in violation of Section 310(b) of the Communications Act. That contract, being in violation of Section 310(b), would have been unenforceable in any court. Cf. *Ryan* v. *KVL*, 198 Wash. 459, 88 P. 2d 836.

This is the light in which the further application for renewal in connection with which the 1943 contract was submitted to the Commission was set down for hearing. In that proceeding, the Commission was concerned with the contract from two aspects: the extent to which the contract resulted in a complete and effective divorcement of petitioner from Southern in a manner which would give full effect to the Commission's enforcement of Section 310(b); and the effect which the contract would have on the future ability of the station to operate in the public interest (R. 53-55). The findings of fact and conclusions of law entered after the hearing held to canvass those issues were also directed to those two aspects of the contract. In holding that the contract gave effect to the prior illegal management contract, the Commission's conclusions were supported by findings as to the disparity between the $50,000 estimated value of the equipment and the $366,000, which was the estimated amount of the payments under the con-

tract (R. 68, 70-71); findings that this disparity was explainable in terms of petitioner's desire to retain the goodwill of respondents and reward them for the commercial success they had made of operating the station (R. 68-69); and findings that the provision for payments under the contract until January 6, 1950, made the duration of those payments coextensive with the period for which the management contract of 1936 was to have been effective by its terms (R. 67-68, 70). These findings afforded ample basis for the Commission's concern that the future operation of the station should not be the vehicle for giving effect to the previous management contract relationship between respondents and petitioner already found by the Commission to be illegal. Although the remaining two grounds for the Commission's conclusion required a prediction as to the uncertainties of the future, this ground rested on the certainties of the past.

The Commission's conclusion that the payment under the contract would have a detrimental effect on the station's future ability to operate in the public interest was based on the fact that the provision for payment of 15% of its gross income for a period of more than seven years saddled upon the station a fixed obligation to pay a substantial percentage of net income which, it was found, might possibly exceed 70% of such net income, as would have been the case in 1942, and which was likely

to result in serious problems if the station's commercial position were to retrogress (R. 69).

The Commission also found that the extension of this burden of payment of 15% of gross income to all other new broadcasting developments, including FM and television, as well as the standard broadcast operations of Station WGST, would have the effect of restraining the petitioner from entering the field of FM and television broadcasting. The Commission concluded that such a restraint would "not appear to be in the public interest." (R. 70.)

It was on the basis of these findings and conclusions that the Commission decided that a renewal of petitioner's license with the petitioner subject to this contract would not be in the public interest. But the Commission also concluded, just as it had when it initially found that the management contract relationship was unlawful, that the continued operation and control of the station by petitioner itself on a basis which did not give effect to the earlier relationships would be in the public interest (R. 45, 71).

The state court judgments here under review are in the face of these Commission determinations. In substituting their own judgment for that of the Commission in passing on the contract of April 15, 1943, which was proffered as an attempt to eliminate the relationships between petitioner and Southern which were illegal under Section 310(b) of the Act, the courts below failed entirely

to give any consideration to the express finding of the Commission that this subsequent contract permitted "a party to an arrangement found by the Commission to be in contravention of law" to "continue to profit from such an arrangement", and that to "condone such illegality" would "thwart the Commission's efforts to enforce the requirements of the Act." (R. 71) The courts below were thus not content to substitute their own judgment as to whether the contract involved the public interest in a manner which could appropriately be the subject of adjudication by the Commission. They also supplanted the Commission's judgment as to what was required to be done and to be prevented in order to enforce Section 310(b) of the Act effectively.

The judgment of the courts below also denies significance to the Commission's choice of the alternative of not denying the application for renewal of license outright, but granting the license on condition that no further effect would be given to the contracts found by the Commission to be illegal and inconsistent with the public interest.

An outright denial would certainly have had the effect of insuring that the previous illegal relationships were discontinued or otherwise given no effect. But such a denial would not simply terminate the operation of Station WGST and destroy altogether all value to respondents in their relationships with petitioner, except the value of the equipment and other physical assets, if respond-

ents could establish title to them. It also would have destroyed petitioner's opportunity to secure a renewal of license on the basis of a showing that it would assume the responsibility for operation of the station.

More seriously, from the standpoint of the public interest, is the fact that outright denial would also have deprived the School of a radio station which would be controlled and operated by its governing body, and the community of a service rendered by a station so operated. The Commission's decision that so drastic a course was not necessary in the public interest was not challenged by petitioner or respondent, and is, of course, not now open to review. However, the decision of the court below implies an independent judgment that the Commission could have effectively achieved the purposes plainly announced in its decision only by an outright and absolute denial, and that the failure to take that course leaves the state court with power to order the payments under the contract. Those who are subject to the authority of the Commission should be able to rely on the full force and effectiveness of the Commission's findings and conclusions in collateral proceedings, and the Commission should be able to expect that its findings and conclusions will be given effect when they are relevant to the resolution of issues in a private litigation. If this reliance and legitimate expectation were to be deemed groundless, the Commis-

sion would be left with no recourse but resort to the most drastic exercise of its powers in order, at least, to make some portion of its policies under the Act effective. But the result of such an exercise of power—an outright denial of license—would serve the interests of neither the petitioner, the respondents, nor the public.

If the judgments below were allowed to stand, the Commission's power to determine how the public interest in the field of radio may be most effectively promoted, and the multitude of divergent facets of policy best accommodated to that end, would be limited and curtailed by the power of the courts to disregard these refinements in the exercise of their power. The statutory purposes of the Communications Act are not most effectively achieved by all or nothing decisions. The Act does not contemplate that the Commission must be content either with ensuring the continued availability of the station's service under management by respondents not in conformity with the Act, and forget about effective enforcement of Section 310(b), or else with ensuring enforcement of that Section by an outright, unqualified denial without regard to any considerations as to the desirability of a radio service for the community offered under the management and control of the School itself. This Court has held that the advantages of suppleness and flexibility in the accommodation of many different facets of policy,

characteristics which led to the development and growth of the administrative process, are not realized when one aspect of policy is permitted to blot out others which are pertinent. *Jacob Siegal Co.* v. *Federal Trade Commission,* 327 U.S. 608.

The nub of the Government's contention is that the decision of the courts below leaves the Communications Commission no choice but to reverse its prior position as to the illegality of the petitioners' arrangements with respondents or to revoke or deny renewal of petitioners' radio station license at the earliest opportunity. These inevitable consequences of the state court judgments make clear the conflict between those judgments and an untrammeled exercise of the Commission's discretion. For to allow a state court judgment in a contract action to operate as a compulsive force requiring the reversal of the Commission's considered judgment as to the public interest and the requirements of the statute is plainly unthinkable. But if that alternative is rejected, the Commission is powerless to do anything but deny the radio station license and terminate broadcasting by the station. This course would be in the face of the Commission's finding that "a continuation of the program service of Station WGST under proper management will serve the public interest, convenience and necessity." (R. 45). And, certainly, the Commission is legitimately concerned with "the protection of

that public interest which led to the granting of a license". *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 132. In such a situation, the judgment of one tribunal must be subordinated to that of the other and, under our scheme of Government, it is plain that the state court judgment must fall.

Recognition that the Communications Act does not confer authority on the Commission *for the purpose of* adjudicating private rights (see *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134) does not at all imply that the action which the Commission does take within the scope of its authority, when given its proper recognition and effect by those who sit to adjudicate private rights, cannot have the effect of altering such private rights. See *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 365.

The decision of the Commission does not destroy the private rights of respondents, so far as respondents have an interest in what they have parted with under the contract. For the cases make it clear that while federal action may render a contract impossible of performance (*L. & N. R.R. Co.* v. *Mottley*, 219 U.S. 467), that does not foreclose the party who is unable to obtain performance from securing a reasonable value of what he has parted with if such equitable remedy is available under state law. *N. Y. Central & H. R. R. R. Co.* v. *Gray*, 239 U.S. 583. Cf. *Ryan* v. *KVL*, 198 Wash. 459, 88 P. 2d 836.

II

The Findings of the Commission on the Contract of April 15, 1943, Made With Respect to a Subject Matter Involved in the Exercise of Licensing Functions Under the Communications Act, Are Reviewable Only in the Manner Prescribed by the Communications Act and Are Not Open to Collateral Attack in Either Federal or State Courts.

The courts below, in reexamining the findings of the Commission, and in substituting their own judgment as to the public interest for that reached by the Commission in the exercise of its licensing functions (see *supra*, pp. 12-13, note 4) have not only frustrated the effectiveness of the Commission's action but have also denied effect to the Congressional scheme for review of Commission orders. The Communications Act provides a remedy and method of appeal in the case of denial of an application for renewal of a radio station license, Section 402(b). That remedy is available not only to the applicant but also to "any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application." Section 402(b)(2). Among the persons who may resort to the statutory review proceedings under this section is a party to a contract with a licensee whose application for renewal has been granted upon condition that the licensee terminate relationships found by the Commission to be contrary to the Communications Act and inconsistent with the operation of the station in the public interest. *Churchill Tabernacle* v. *Federal Communications Commis-*

sion, 160 F. 2d 244 (C.A.D.C.) The remedy provided by the Act for review of Commission decisions is exclusive, and actions of the Commission reviewable under these provisions may not be reviewed in the federal courts in any other manner. *Sykes* v. *Jenny Wren Co.*, 78 F. 2d 729 (C.A.D.C.), certiorari denied, 296 U.S. 624; *Monocacy Broadcasting Co.* v. *Prall*, 90 F. 2d 421 (C.A.D.C.) Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41.

It is equally well settled that the determination of a federal agency may not be collaterally attacked in proceedings in state courts but may be challenged only in the appropriate review proceedings established by law. In the case of *Venner* v. *Michigan Central Railroad Co.*, 271 U.S. 127, a stockholder brought suit in a state court against a railroad to enjoin it from carrying out an agreement, the performance of which was authorized by the Interstate Commerce Commission. This Court held that the suit was, in effect, one to review and set aside a determination of the Interstate Commerce Commission, and that the state court was wholly without jurisdiction to entertain such a suit since Congress had specifically provided a method of review of orders of the Interstate Commerce Commission. See also *Atchison, Topeka and Santa Fe Ry.* v. *Scarlett*, 300 U.S. 471; *Hagens* v. *United Fruit Company*, 135 F. 2d 842 (C.A.2); *Inghram* v. *Union Stockyards Co.*, 64 F. 2d 390 (C.A.8); *Michigan Consolidated Gas Co.* v.

Panhandle Eastern Pipe Line Co., 173 F. 2d 784, 789 (C.A.6); *Berg* v. *Cincinnati, Newport and Covington Railway Co.*, 56 F. Supp. 842 (E.D. Ky.); *Harris* v. *Central Nebraska Public Power and Irrigation District*, 29 F. Supp. 425 (D. Neb.)

Since, as we have shown above, the Commission's findings as to the contract of April 15, 1943, were made in the exercise of authority conferred on the Commission by the Communications Act, these findings were not open to collateral review by any court. Nor is any justification for such collateral review by the courts below afforded by the fact that respondents were not formally made parties to the proceedings in Docket 6534 by affirmative action of the Commission.[8] The Communications Act imposes no requirement that the Commission itself take action to join as parties in licensing proceedings persons having contractual or other

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[8] The trial court's finding that "The Federal Communications Commission was without jurisdiction to nullify, change or otherwise modify the duties and obligations of the parties to the contract of April 15, 1943" (R. 109) was based, in part, on its finding that respondents were not parties to the proceedings in Docket 6534 (R. 109). This reliance is also reflected in the manner in which the case of *Malvern* v. *Chicago, R. I. & P. Ry. Co.*, 182 Fed. 685 (C. C. E. D. Ark.) is cited as authority (R. 110). The *Malvern* case, which involved a report setting out recommendations, is obviously not relevant to the issue of the binding effect of an adjudicatory licensing determination in a private litigation involving the same subject matter and parties who were before the Commission or had an adequate opportunity to appear before it to assert their position with respect to the matters adjudicated.

relationships with the licensee, which may be relevant to a determination whether the public interest would be served by a grant of the application. Section 309(a) of the Act [47 U.S.C. 309(a)] makes express provision for notice to the applicant and an opportunity to be heard in cases in which the Commission is unable to determine that the grant of an application would be in the public interest. The Commission's Rules of Practice and Procedure (See Section 1.102, Appendix, *infra*, pp. 62-63), make provision for intervention in such hearings by interested persons. And Section 405 of the Act affords to persons "aggrieved" or "adversely affected" by Commission action an opportunity to petition for rehearing and reconsideration, just as Section 402(b)(2) makes available to such persons an opportunity to secure judicial review.[9]

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[9] The facts here, in the context of the opportunities available to respondents under the Act and the Commission's rules make entirely applicable the following language of the court entrusted with exclusive jurisdiction of appeals in licensing proceedings, in the case of *Red River Broadcasting Co.* v. *Federal Communications Commission*, 98 F. 2d 282, 286 (C. A. D. C.), certiorari denied, 305 U. S. 625:

> The burden, therefore, is, and properly should be, upon an interested person to act affirmatively to protect himself. It is more reasonable to assume in this case a legislative intent that an interested person should be alert to protect his own interests than to assume that Congress intended the Commission to consider on its own motion the possible effect of its action in each case, upon every person who might possibly be affected thereby. Such a person should not be entitled to sit back and wait until all interested persons who do so act have

In the absence of a statutory requirement for joinder of other persons who may be adversely affected by action on an application, the question presented by a non-joinder of such other persons is, to formulate it in the language of this Court in the case of *National Licorice Co.* v. *National Labor Relations Board,* 309 U.S. 350, 362, "whether, in the circumstances of this case, the exercise of the [Commission's] authority is such a departure from accepted modes of procedure as rightly to be regarded as beyond the power conferred by * * * the Act." In the circumstances of the instant case, where the undisputed facts show that respondents had adequate and timely actual notice and knowledge of the proceedings before the Commission and the availability of an opportunity to intervene or petition for reconsideration, under the provisions of the Act and the Commission's Rules, no claim that the Commission's procedures did not afford respondents an adequate opportunity to be heard could be seriously maintained.

In the proceedings in Docket 6534, the Commission did not formally join either Southern or respondents as individuals in the proceedings, just as it had not done so in the earlier proceedings in Docket 5903. However, in those earlier proceed-

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been heard, and then complain that he has not been properly treated. To permit such a person to stand aside and speculate on the outcome; if adversely affected, come into this court for relief; and then permit the whole matter to be reopened in his behalf, would create an impossible situation.

ings, Southern intervened as a party under the provisions of Section 1.102 of the Commission's Rules of Practice and Procedure, then in effect (quoted in the Appendix, *infra*, pp. 62-63). In those proceedings in Docket 5903, Southern was represented by Clarence H. Calhoun, President of Southern and, one of the respondents in the instant case, and by George B. Porter, who appeared to have an extensive background in radio matters (Cf. R. 101-103). No exceptions to the Commission's proposed decision in that proceeding were filed by Southern, nor did it file a petition for rehearing or reconsideration of the final order, as it could have done under Section 405 of the Act. And no appeal was taken by Southern under the provisions of Section 402(b)(2) of the Act.

The record leaves little doubt that the contract of April 15, 1943, was entered into by the petitioner and respondents in an effort to settle the claims of respondents in a manner which would remove the obstacle to the granting of petitioner's renewal application created by the former relationship between petitioner and Southern (R. 91, 100). When, after examination of petitioner's further application for hearing and the accompanying contract of April 15, 1943, the Commission was unable to determine that a grant of the application would serve the public interest, and the Commission set the application down for hearing in Docket 6534 on issues relating to the contract and those prior relationships, the Commis-

sion in fact sent a copy of the notice of hearing in Docket 6534 to Southern by mailing it to Mr. Calhoun, as president of Southern. (R. 55). The facts stipulated in the trial court below also show that respondents actually received this notice of hearing and that they had actual knowledge of the holding of the hearing, of the proposed decision of September 19, 1945, and of the final order of November 9, 1945 (R. 94, 95). Moreover, the exhibits which respondents introduced in the trial court below afford a fair basis for the inference that respondents were content to have their position with respect to the contract presented to the Commission by petitioner (R. 101-107). In fact, the record also shows that petitioner vigorously defended the contract by filing a petition for grant of the application without a hearing after the issuance of the order of October 12, 1943 (R. 56-63). And when, after hearing and the issuance of the proposed decision, petitioner felt that it could no longer contest the decision of the Commission, it gave prompt notice through a letter of Mr. Marion Smith, then Chairman of the Board of Regents (R. 20), to Mr. Calhoun, president of Southern, at a time when Southern or respondents could have intervened and filed exceptions to the Commission's proposed decision (R. 106).[10]

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[10] In the case of *Churchill Tabernacle* v. *Federal Communications Commission*, 160 F. 2d 244, the appellant was not originally joined as a party to the proceedings, and filed a motion to intervene after the hearing had been held and prior to final decision by the Commission.

The record thus shows that under circumstances where the Commission's rules afforded an adequate opportunity for intervention in the proceeding, and Section 405 of the Act afforded an opportunity for seeking reconsideration of the Commission's decision, respondents, with a knowledge of these opportunities sharpened by actual exercise in the earlier proceedings, nevertheless failed to avail themselves of these avenues toward possible relief at a time when they knew that proceedings affecting their interest under the contract of April 15, 1943 were in progress before the Commission. These facts provide no nourishment for any contention that the Commission exceeded its statutory authority or otherwise denied respondents due process in the manner in which it conducted the proceedings in Docket 6534.

III

The Petitioner Is, at the Least, Entitled to a State Court Consideration of Its Defense to the Contract Action in Which the Starting Point Would Be the Commission's Findings.

In Point I of this brief, we have argued that the state court judgments here cannot stand since they frustrate the Commission's decision and are in conflict with Section 310(b) of the Communications Act as applied. In Point II, we have sought to show that this conclusion cannot be avoided by collaterally attacking the Commission's findings. But even if the argument of frustration be rejected, a remand of this cause is nevertheless required.

Georgia's law, like that of other states,[11] makes available the defense of impossibility where governmental action operates to prevent or prohibit performance. *Union Dry Goods Company* v. *Georgia Public Service Corporation*, 145 Ga. 658, affirmed, 248 U.S. 372; cf. *Federal Land Bank* v. *Shingler*, 174 Ga. 352, 361. From the fact, which for present purposes we assume, that the federal statute and the Commission order here involved do not stand in the way of entry of the judgments rendered by the courts below, it does not follow that, as a matter of state law, the Commission's order may not be deemed ground for sustaining the defense of impossibility of performance asserted by the petitioner in this action. Had the state court accepted the Commission's decision as being within that body's licensing authority but, nev-

[11] See American Law Institute, *Restatement of Contracts*, Sec. 458:

SUPERVENING PROHIBITION OR PREVENTION BY LAW.

A contractual duty or a duty to make compensation is discharged, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prevented or prohibited

(a) by the Constitution or a statute of the United States, or of any one of the United States whose law determines the validity and effect of the contract, or by a municipal regulation enacted with constitutional or statutory authority of such a State, or

(b) by a judicial, executive or administrative order made with due authority by a judge or other officer of the United States, or of any one of the United States.

ertheless irrelevant to a determination of private contract rights, the petitioner's case here would stand or fall on the arguments made in the earlier sections of this brief. But the state court took no such ground.

The court below did not deny that the Commission decision was relevant to this contract action;[12] it was able to avoid decision on the issue of impossibility only by challenging the Commission's determination as to the public interest involved, and, on the court's own assessment of that interest, finding the Commission without authority to "abrogate a private contract between" petitioner and respondents (R. 137).

But, if, as we have sought to show in the preceding section of this brief, the state court was not free to indulge its own view as to the requirements of the public interest, and it is so instructed by this Court,[13] it will, for the first time, be compelled

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[12] A claim that performance of the contract was not in any way dependent on the action of the Commission on petitioner's application for renewal would find no support in the record. The fact that the payments constituting performance were to come from the operation of the station (which could be lawfully operated only under a license granted by the Commission, Communications Act, Section 301, Appendix, *infra*, pp. 53-54), is put beyond question by the provisions of paragraph 6 of the contract of April 15, 1943 (R. 14).

[13] *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 365, leaves no room for any suggestion that findings as to the public interest sufficient for denial of a license may nevertheless be inadequate ground for denying enforcement of a contract against a party federally ordered to give the contract no effect.

squarely to deal with the defense of impossibility raised by the petitioner.

To permit of such consideration of questions of state law unencumbered by an erroneous view of the federal law, this Court should at least vacate the judgment of the court below and remand the cause for further proceedings. *State Tax Comm'n* v. *Van Cott*, 306 U.S. 511. It hardly need be added that, in the Government's view, nothing short of a reversal of the judgment below would completely vindicate the federal rights here involved.

CONCLUSION

For the reasons set out in Points I and II, the judgment of the court below should be reversed.

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APPENDIX

THE PERTINENT PROVISION OF ARTICLE VI OF THE CONSTITUTION OF THE UNITED STATES READS AS FOLLOWS:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

COMMUNICATIONS ACT OF 1934, 48 STAT. 1064, AS AMENDED, 47 U.S.C. 151, ET. SEQ.

Title I—General Provisions

Purpose of Act; creation of Federal Communications Commission

SECTION 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of

securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

Provisions relating to the Commission

SEC. 4. (i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

Title III—Provisions Relating to Radio

Part I—General Provisions

License for radio communication or transmission of energy

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation

with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

General powers of the Commission

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

Waiver by licensee

SEC. 304. No station license shall be granted by the Commission until the applicant therefor shall

have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

Allocation of facilities; term of licenses

SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

Applications for licenses; conditions in license for foreign communication

SEC. 308. (a) The Commission may grant licenses, renewal of licenses, and modification of liceses only upon written application therefor received by it: *Provided, however,* That in cases of emergency found by the Commission, licenses, renewals of licenses, and modifications of licenses, for stations on vessels or aircraft of the United States, may be issued under such conditions as the Commission may impose, without such formal application. Such licenses, however, shall in no case be for a longer term than three months: *Provided further,* That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to

be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

Hearings on applications for licenses; form of licenses; conditions attached to licenses

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in ~~accordance~~ with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may

prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

Limitation on holding and transfer of licenses

SEC. 310. (b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing.

Revocation of licenses

SEC. 312. (a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States: *Provided, however,* That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation.

Title IV—Procedural and Administrative Provisions

Proceedings to enforce or set aside the Commission's Orders—Appeal in certain cases

SEC. 402. (a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license) and such suits are hereby authorized to be brought as provided in that Act.

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

Rehearing before Commission

SEC. 405. After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear: *Provided, however,* That in the case of a decision, order, or requirement made under title III, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a re-

hearing is granted, the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination, shall be subject to the same provisions as an original order.

RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION

SEC. 1.102. [As of October 12, 1943; 4 F.R. 3344, effective August 1, 1939, as corrected 4 F.R. 3426] *Intervention.* Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest and must be subscribed and verified in accordance with section 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of

any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of hearing unless on motion of the Commission shall amend the same.

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